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ILLINOIS CIRCUIT COURT REPORTS

REPORTS OF CASES

DECIDED IN THE

CIRCUIT, SUPERIOR, CRIMINAL, PROBATE,
COUNTY AND MUNICIPAL COURTS

IN

ILLINOIS

AND INCLUDING THE

UNREPORTED DECISIONS OF THE SUPREME COURT OF
ILLINOIS AND THE FEDERAL COURTS IN ILLINOIS

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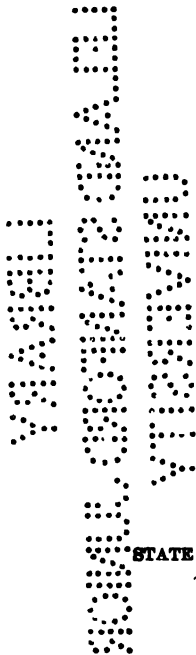
FRANCIS E. MATTHEWS
HAL CRUMPTON BANGS AND
DAVID F. ROSENTHAL

OF THE CHICAGO BAR

VOLUME II

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PREFACE.

The favorable reception accorded by the judges and the members of the bar to the first volume of this series of reports has assured the continuation and permanency of the series. The editors hope to be able to report in the future volumes all the current decisions of the lower courts of Illinois which are within the scope of the present reports and of sufficient importance to the bar, in the opinion of the editors, to justify publication. It is intended also to publish in these volumes from time to time all unreported decisions of the courts of Illinois, irrespective of the date of their rendition, and including a number of unreported decisions of the Supreme Court. With this end in view the publishers will be glad to receive from the judges and the members of the bar of Illinois any decisions which fall within the scope of these reports.

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CIRCUIT COURTS OF ILLINOIS.

(County Court of Hancock County.)

The People of the State of Illinois upon the Relation of Rudolph Anton, County Treasurer,

VS.

The Atchison, Topeka & Santa Fe Railroad Company.

(1906.)

1. **FRANCHISE—DEFINED.** A franchise is a particular privilege conferred by grant from the sovereign or government and vested in individuals or a corporation.
2. **TAXATION—FRANCHISES CONFERRED BY CONGRESS.** Franchises conferred by congress, cannot, without its permission, be taxed by the states.
3. **SAME—FRANCHISES—POWER OF LOCAL ASSESSORS.** Where one part of a bridge structure is devoted to railroad purposes and the other part contains toll wagon ways which are situated upon either side of the railroad tracks and the bridge property is assessed as a whole by the state board of equalization, the local assessors have no right to levy a tax upon the right to operate the toll wagon ways, as such ways are equally a part of the franchise, which can only be assessed by the state board of equalization.
4. **SAME—OMITTED PROPERTY.** Nor can such toll wagon ways be assessed as "omitted property" inasmuch as the state board of equalization extended its assessment upon the entire bridge property. Nor is it material that the property should have been separately assessed.
5. **SAME—SEPARATE PROPERTY TAXED UNDER GENERAL DESCRIPTION.** Where one general description is used in the taxation of property, the whole is comprehended, even though the object is capable of being separated into separate classes of property, for purposes of taxation. If it is not so separated, the whole is included under a general description.

6. **SAME—DEFINITENESS OF ASSESSMENT.** An assessment as definite as the grant under which the land is held, is sufficient.
7. **SAME—OMITTED PROPERTY.** To permit the assessment of omitted property, it must be omitted in fact, and an assessment, even though irregular, is sufficient to prevent a re-assessment as omitted property.

Petition for judgment and sale for nonpayment of taxes.

The facts are stated in the opinion. Heard before Judge J. W. Williams.

G. V. Helfrich, state's attorney, and *D. E. Mack*, for the People.

J. D. Miller, for defendant.

Opinion by Judge J. W. WILLIAMS:—

This is a suit wherein the people seek judgment and order of sale against the property hereinafter described, for the alleged non-payment of taxes for the years 1901, 1902, 1903 and 1904.

It was attempted to be assessed by the county board of review, of Hancock county, in September, 1904, for said years, and a valuation of \$50,000 was placed upon the same, for each of said years, and it was taxed for each of said years at \$10,000 (being one-fifth of the valuation thereof).

The property was returned delinquent for alleged taxes as follows: For 1901, \$277; for 1902, \$423; for 1903, \$454.80; and for 1904, \$526.51.

Objection is made against rendition of judgment as to any of said years, and upon the hearing the stipulation of the parties was introduced, and there was also oral and documentary evidence offered and considered in evidence.

It appears that the bridge property, as a whole, was assessed by the local assessor of Appanoose township, where the property is situated, for the years 1901, 1902, 1903 and 1904, upon a valuation of \$400,000, and an assessed value of \$80,000, upon which taxes as to the years 1901, 1902 and 1903 were extended. These taxes were not paid, and the property was returned delinquent for each of said years. Objections were filed as to each of said years, against the

rendition of judgment, and upon the hearing of the same, the objections were sustained and judgment was accordingly refused.

No appeal was taken from such refusal of judgment for the years 1902 and 1903, but as to such judgment of 1901 the people perfected an appeal to the supreme court. The judgment of the said county court was affirmed in said supreme court; the opinion may be found reported in vol. 206, at page 252, of the Illinois Reports.

Said decision as it appears to me has little bearing upon the present case, for the reason that in such assessments by the local assessor there was an attempt to assess the whole bridge, when it appears that on June 1, 1900, the then owner of said bridge conveyed said bridge with its rights and franchises to said railroad company. Such conveyance was made under the authority of the act entitled, "An Act concerning the rights, powers and duties of certain corporations therein mentioned, authorizing the sale and transfer of any railroad, or railroad and toll bridge, and other property, franchises, immunities, rights, powers and privileges connected therewith, or in respect thereto, of any corporation of this state to a corporation of another state and prescribing the rights, powers, duties and obligations of the purchasing company." Approved April 21, 1899, and in force July 1, 1899. See Session Laws of 1899, at page 116.

The legal effect of said conveyance, in connection with the above statute, was to make said bridge a part of the railroad system of the Atchison, Topeka & Santa Fe Railway Company, and to make it taxable as railroad property. The act expressly authorized railroads to acquire title to and operate such bridges whether with or without toll wagonways. The stipulation in this case shows that the said bridge was so operated as a railroad and toll bridge since its acquisition as aforesaid.

Under any view that may be taken of said act, at least a part of said bridge became in effect railroad track, and only liable to assessment by the state board of equalization, and of course the action of the local assessor could not under any

view be sustained in attempting to assess the whole bridge structure.

Since June, 1900 (the date of its purchase by said company), it has been assessed by the state board of equalization for each of the years 1901, 1902, 1903, and 1904, and the taxes so assessed have been paid for each of said years.

It appears from the schedule submitted to said board, and a copy of which was filed with the county clerk of this county, that for the year 1904, the description of the bridge property upon which taxes were assessed by the state board of equalization, was as follows: "Island No. 15, from east end of bridge to west side of Island No. 15, or center of pier No. 8, and from center of pier No. 8 to center of pier No. 4, of Iowa and Illinois state line. This was formerly property of Mississippi River Railroad & Toll Bridge Company, and is now owned and operated by the Atchison, Topeka & Santa Fe Railway Company."

The description upon which taxes were extended for the years 1901, 1902 and 1903 was substantially the same as that for 1904 and need not be here repeated. Upon this description all taxes so assessed by said state board were paid. This fact clearly appears from the stipulation filed in the case as to each of said years.

In the decision of the supreme court hereinbefore referred to, there is a reference to the question of the possible separation of the bridge structure into two parts for taxing purposes; one being the part devoted to the railroad business, and the other part being the toll wagonways upon either side of the railroad track.

Said supreme court carefully refrained from deciding the question of the divisibility of the structure into such two parts, and it is not decided whether such separation may be made for taxing purposes.

The assessments for said years 1901, 1902, 1903 and 1904 by said board of review were made upon the theory that the bridge property could be so divided.

The description by which the toll wagonways were assessed for each of said four years is as follows:

Two toll wagon roadways, one on either side of that part of the railroad track on the bridge of the Atchison, Topeka & Santa Fe Railway Company, described as follows: Commencing in the center of the main channel of the Mississippi river, which for more accurate account is designated to be the center of pier No. 5, known in the C. S. F. and C. survey as station No. 8, and 64 6-10 on the fifth pier of the main bridge from the Iowa shore from the bank of said river, counting the Iowa shore abutment as pier No. 1, thence in a southeasterly direction 1,224 1-10 feet to the center of pier No. 10, known in the C. S. F. & C. survey as station No. 20, and 88 7-10, said pier No. 10 being the tenth pier from the Iowa shore; situated on island No. 15, in sections 3 and 10 in Appanoose township, being township 7 north, range 8 west, from the 4th principal meridian, in Hancock county, Illinois, and also the approaches to said roadway and abutments and piling upon which said approaches rest, extending from the Illinois shore in said section 10 to said pier No. 10 of said railroad bridge, said roadways consisting of floors, side walls, supports, braces, stays, and irons and timbers attaching said roadways to said railroad bridge, together with the right to have said roadways attached to said railroad bridge as they are now attached, and to operate said toll roadways as they are now operated; section 10, township 7, range 8.

The objections against the rendition of judgment are many.

It is only necessary to consider two of them, in the decision of this case.

1. Are the assessments for said four years an attempt to assess a franchise or part thereof?

2. Have the taxes for any of said years been assessed and paid so as to make the assessment illegal and double taxation?

But little authority has been furnished me upon the first question.

In the description of the property, for each of the four years, occurs the following language: "Together with the right to have said roadways attached to said railroad bridge,

as they are now attached, and to operate said toll roadways, as they are now operated." The contention is made by the objector that this is an attempt to assess and tax a franchise or a part thereof.

A franchise is defined as a particular privilege conferred by grant from a sovereign or government and vested in individuals or a corporation. *Chicago Municipal Gas Light & Fuel Co. v. Town of Lake*, 130 Ill. 42.

A franchise is a special privilege emanating from the sovereign power, and owing its existence to a grant or to prescription presupposing a grant. *Wilmington Water Power Co. v. Evans*, 166 Ill. 548.

Corporate franchises proceed from the government or the sovereign power and owe their existence to a grant. *Chicago City Railway Co. v. People ex rel. Story*, 73 Ill. 541.

A franchise is a royal privilege or branch of the king's prerogative, subsisting in the hands of the subject and must come from the king's grant. *Ibid*.

There was a franchise granted in the case before us, by the state of Iowa to the "Fort Madison and Illinois Railway and Bridge Company," in February, 1882, authorizing and empowering said company to construct, maintain and use a railroad and wagon bridge across the Mississippi river at Ft. Madison, Iowa.

In November, 1886, there was a corporation organized known as the Mississippi River Railroad and Toll Bridge Company, under the provisions of the statutes of Illinois, having for its object the construction, maintenance and operation of a railroad and wagon bridge over the Mississippi river.

In December, 1886, said Iowa corporation assigned and transferred all of its rights to the said Illinois corporation. The bridge in question was built by said Illinois corporation in accordance with the laws of the United States and the states of Illinois and Iowa, and in pursuance of the charters of said two bridge companies, and is a lawful structure.

In 1872, the senate and congress of the United States passed an act to authorize the construction of a bridge and

to establish the same as a post road across the Mississippi river, at Ft. Madison, Iowa. This act confers a franchise to such persons as shall have authority from the states of Illinois and Iowa, to build a bridge over said river, and is in effect a federal franchise to the parties now owning and operating the same, who have at the same time franchises from the states of Illinois and Iowa, for the same purposes.

All of the above facts appear from the stipulation filed in the cause and are undisputed.

In the description of the toll wagon ways, as said before, occurs language showing that there is included in addition to the tangible property "the right to have said roadways attached to said railroad bridge as they are now attached, and to operate said toll roadways as they are now operated." The toll wagon ways could never have been constructed, maintained or operated, save under the franchises granted.

Since said bridge was built, it has been operated lawfully, under the franchises above referred to; without such franchises it could not have been lawfully operated. In my opinion such part of the description of the toll wagon ways as is above referred to cannot be disregarded nor rejected as surplusage. It is a material part of the description, and in my opinion is a clear attempt to value, assess and tax the right of the company to operate the roadways. The language used in the description forbids every other construction.

The local taxing authorities have no jurisdiction over franchises.

Franchises conferred by congress cannot, without its permission, be taxed by the states. *California v. Central Pacific R. R. Co.*, 127 U. S. 1.

A Kentucky corporation, operating a ferry across the Ohio river, is deprived of its property without due process of law by the action of that state in including, for purposes of taxation, in the valuation of the franchises derived by the corporation from Kentucky, the value of an Indiana franchise for a ferry from the Indiana to the Kentucky shore, which such corporation had acquired. *Louisville & Jeffersonville Ferry Co. v. Commonwealth of Kentucky*, 188 U. S. 385, 399.

In my opinion, the inclusion of the "right" to operate the toll wagon ways is fatal and that judgment cannot be rendered for any of the years 1901, 1902, 1903, and 1904, in this suit.

It is not strictly necessary to pass upon any other questions involved herein, but inasmuch as counsel have, on each side, favored me with learned briefs, as well as oral arguments, I deem it but proper to also consider the second point as well as the first.

The board of review of Hancock county undertook to assess said toll wagon ways of said bridge, for the years 1901, 1902 and 1903, as "omitted property," under the provisions of secs. 276 and 277.

It clearly appears from the record in this case, that the state board of equalization extended its assessment upon the bridge as a whole, there being no language in the description that would justify the construction that a part of the bridge was excepted.

Where one general description is used, the whole is comprehended, even though the object is capable of being separated into separate classes of property, for purposes of taxation. If it is not so separated, the whole is included under a general description such as is here used.

If the company had failed to pay its taxes for either of the years 1901, 1902, and 1903, and there had been judgment and sale and deed to the purchaser, there would be no question but that the grantee in the tax deed would have received title to the whole bridge.

"An assessment as definite as the grant under which the land is held, is sufficient." 1 Cooley on Taxation, p. 747.

In 1 Cooley on Taxation, p. 742, it is said that "the purposes in describing the land are: First, that the owner may have information of the claim made upon him or his property; second, that the public in case the tax is not paid, may be notified what land is to be offered for sale for the non-payment; and third, that the purchaser may be enabled to obtain a sufficient conveyance. If the description is sufficient for the first purpose it will ordinarily be sufficient for the others also."

In the view I take of the case, there can be no question but that the bridge was not omitted property so as to permit its assessment for the past years 1901, 1902 and 1903. For each of these years it had been assessed as one complete structure by the state board of equalization, and the taxes were paid, and even if the bridge ought to have been divided for taxing purposes, for said three years, it was not so divided, and the taxes (even if irregularly assessed) having been paid thereafter, it cannot be assessed as "omitted property" for said years.

In *The Wabash Railroad Company v. The People, ex rel. Samuel M. Funk, County Collector*, 196 Ill. 606, it is held that "An assessment against a railroad company as for 'omitted' school taxes is not authorized by sections 276 and 277 of the revenue act, where all school taxes levied upon the property during such years have been paid to the district for which they were levied, although the levy was made for the wrong district, and where all school taxes levied for the right district have been extended against other property than that of the railroad company and been paid." Section 276 is as follows: "If any real or personal property shall be omitted in the assessment of any year or number of years, or the tax thereon for which such property was liable, from any cause has not been paid, or if any such property by reason of defective description or assessment thereof, shall fail to pay taxes for any year or years, in either case the same, when discovered, shall be listed and assessed by the assessor and placed on the assessment and tax books. The arrearages of tax which might have been assessed, with ten per cent. interest thereon, from the time the same ought to have been paid, shall be charged against such property by the county clerk." The railroad property of appellant located in the east half of said sections 25 and 36, was not omitted in the assessment, as it was assessed in each of the years of 1892 to 1898, inclusive. All taxes levied upon said property during those years were paid, and there was no defective description of said property. The section above quoted does not, therefore, authorize the assessment of said property as omitted property.

Section 277 is as follows: "If the tax or assessment on

property liable to taxation is prevented from being collected for any year or years, by reason of any erroneous proceeding or other cause, the amount of such tax or assessment which such property should have paid may be added to the tax on such property for any subsequent year, in separate columns designating the year or years."

In *Ohio & Mississippi Railway Co. v. People*, 123 Ill. 648, the highway commissioners of a township located in Wayne county, from 1875 to 1883, inclusive, levied the necessary road taxes annually upon all taxable property in their town, except the property of the Ohio & Mississippi Railway Company, which was overlooked. In 1886 the omission was discovered, and the commissioners then made out lists for the several districts of the property of said railway company for each year from 1875 to 1883, inclusive, and orders that the road taxes for said years be levied against the property of the company, which were extended accordingly. It appeared that the railroad was assessed for each of said nine years for state, county, and township taxes, except district road taxes, and that it paid in each of said years all taxes assessed against it. It was held that as said railroad property was not omitted in the assessment for any year or number of years, as all taxes levied upon the property had been paid each year, as there was no defect in the description of the property, and as no road tax had been assessed or levied upon the property during the nine years, sections 276 and 277 of the revenue law did not authorize the assessment of said property, for the years 1875 to 1883, inclusive, as omitted property, and the tax was defeated. That case is conclusive against the right of school district No. 2 to assess appellant's property in the east half of sections 25 and 36 for the years 1892 to 1898, inclusive, as omitted property.

In the case of *In re Appeal of William Wilmerton*, 206 Ill. 15, it is held that stock in a building and loan association cannot be assessed to the holder as omitted property, for the years during which, under the statute, it was exempt from taxation, even though the statute was void.

I am aware the decisions in *C., B. & Q. R. R. Co. v. People*, 136 Ill. 660; *C. & N. W. R. R. Co. v. People*, 195 Ill. 184;

People v. State Board of Equalization, 205 Ill. 296; *C. & E. I. R. R. Co. v. People*, 218 Ill. 463, are to the effect that where the company voluntarily return in their schedules property as railroad track, that is not railroad track, in fact, that it is still the duty of the local assessor to assess the parts that are not railroad track, in fact. These decisions seem to be upon the theory that the company has erroneously and voluntarily returned the property as railroad track, and that they can take no advantage of their own wrong.

It is my opinion, notwithstanding the above decisions, that where property has been so returned and paid upon, it cannot afterwards be assessed as omitted property. The contents of such schedules may be voluntary by the company, but the fact that a return is required to be made is not voluntary. It is imperatively required by statute and heavy penalties are provided for a failure to return it in apt time, sec. 49, chap. 120.

The matter of assessing property as "omitted" is a wise provision for compelling all property liable for assessment to pay its equitable share of taxes. When it comes to assessing property as "omitted," I think it must have been omitted in fact and an assessment, even though irregular, would be sufficient to prevent a re-assessment as omitted property.

In my opinion, the above reasoning would not apply to the assessment for 1904. As to such year, the wagon ways were assessed by the county board of review, in lieu of the assessment returned by the local assessor, upon the whole bridge.

If the assessment had been regular in other respects and the bridge was capable of separation for taxing purposes, then in my opinion the tax for 1904 should be sustained.

It is not necessary for me to express my opinion upon the question as to the divisibility of the bridge structure into two parts for taxing purposes. The record in this case is such that that question does not arise, and it would be a work of supererogation to decide a question not before us.

For the reasons given, judgment will be refused as to each of the years for which it is asked.

NOTE.

After the above decision was in proof it was affirmed in the Supreme Court. See 225 Ill. 593.—Ed.

(Circuit Court of Cook County. In Chancery.)

Donker & Williams Co.

vs.

H. G. Vance.

(October 2, 1900.)

1. **SPECIFIC PERFORMANCE—CONTRACTS FOR PERSONAL SERVICES.** Specific performance of a contract for personal services cannot be enforced.
2. **CONTRACTS FOR PERSONAL SERVICES—INJUNCTION TO RESTRAIN BREACH OF—WHAT SERVICES ARE UNIQUE AND EXTRAORDINARY.** A bill filed by an employer against an employee alleging that the defendant is competent, skilled and well versed in the leather goods business and competent to take charge of and become foreman or superintendent of the leather goods department of the complainant and that defendant's knowledge and skill are peculiar to him, and that complainant cannot find any other person possessing the same peculiar skill and qualifications; that by reason of such qualifications complainant employed defendant as foreman; that defendant entered complainant's employ, became acquainted with the names of the persons from whom complainant purchased raw materials, the prices paid for same and the cost of production of the articles manufactured; and that defendant has left said employment and is engaging in business with others in competition with complainant, does not state a case for an injunction.
3. **CONTRACTS FOR PERSONAL SERVICES—INJUNCTION WILL NOT LIE TO RESTRAIN BREACH OF.** The rule that injunction will lie to restrain the breach of a contract for personal services does not apply to contracts between master and servant. It is restricted to cases of actors, players and the like where the services are unique and extraordinary.
4. **SAME.** There is no difference in principle between compelling a party to work for one man in particular and enjoining him from working for others.
5. **CONSTITUTIONAL LAW—SLAVERY—INVOLUNTARY SERVITUDE—WHAT IS.** To compel a servant or employee to work for a particular person is against the spirit of the thirteenth amendment to the federal constitution which prohibits slavery and involuntary servitude. "Involuntary servitude" means servitude outside of slavery. No man can become the servant of another except by contract.
6. **PLEADING—CONCLUSIONS IN.** An allegation that the services of an employee are special and peculiar states a mere conclusion.

Bill to restrain employee from breaking employment contract. Heard on demurrer to bill before Judge Edward F. Dunne.

The facts are stated in the opinion.

Pam, Calhoun & Glennon, solicitors for complainant.

Rich & Loer, solicitors for defendant.

DUNNE, J. —

Can a mechanic who has contracted his services to an employer a definite period of time and who violates his contract and quits his employer's service during the term of the contract be restrained by injunction from working elsewhere during the term of the contract? This is the legal proposition presented by the bill and demurrer filed in this cause.

The salient allegations of the bill are as follows, to-wit, that "defendant is competent, skilled and well versed in the leather goods business and competent and able to take charge of and become foreman or superintendent of the leather goods department of complainant's business;" that "his knowledge and skill are peculiar and special to himself;" that complainant cannot "find any other person possessing the same peculiar skill and qualifications;" that by reason of such qualifications complainant employed him as foreman for \$18 a week in consideration of which defendant agreed to give his whole time, skill and experience for a certain period and to work for no one else; that pursuant to said contract defendant entered complainant's employ, worked for it about two years, became acquainted with the names of the persons from whom complainant purchased its raw materials and the prices paid for the same and the cost of production of the articles manufactured by complainant; that defendant has left complainant's employ and is engaging in business with others in competition with complainant; that "complainant is absolutely unable to replace the defendant and cannot *at the present time* procure any other person possessed with the requisite skill and ability to carry on the services agreed to be performed by defendant." All these allegations are admitted by the demurrer.

At the outset it will be conceded that specific performance of such a contract cannot be decreed. No court in any country where the common law prevails has ever attempted to compel one man to work for another no matter how solemnly he has contracted so to do. It is to be hoped that many years will yet elapse before such a decree will be entered. Nevertheless it is contended by counsel for complainant that while courts of equity will not affirmatively enforce the specific performance of such contracts they will negatively enforce the performance of the same by enjoining the person so contracting from working elsewhere, and in support of their contention they cite numerous authorities. *Hoyt v. Fuller*, 19 N. Y. S. 962; *Duff v. Russell*, 14 N. Y. S. 134; ¹ *Canary v. Russell*, 30 N. Y. S. 122, 9 Misc 58; *Daly v. Smith*, 49 How. Prac. 150, 38 N. Y. Super. Ct. 158; *Hayes v. Willio*, 11 Abbott's Prac. N. S. 167; *McCaull v. Braham*, 16 Fed. 37. All of these cases on examination will be found to be not cases between master and servant or employer and employee providing for the rendering of services which would bring the contracting parties in close personal contact from day to day over a lapse of time, but pure theatrical contracts providing for the production of certain plays or exhibitions before the public and in all of them it would appear that large amounts of money had been expended in providing theaters, advertising, etc., upon the faith of the contracts. Because of such expenditures and because the services contracted for were in their very nature unique and of an extraordinary character so that they could not be replaced, and consequently there could be no adequate remedy at law, the court of chancery has very properly intervened to prevent the contracting performers from exhibiting elsewhere. There is a plain distinction between such cases and cases involving the relation of master and servant or employer and employee. In the latter cases constant every day contact between the parties is common, if not absolutely essential. In the former it is uncommon and unnecessary. In the latter the servant is subject to the varying orders and directions of the master. In the former

¹ S. C. 16 N. Y. S. 958, 133 N. Y. 678, 31 N. E. 1.

the theatrical performer is subject to no orders save such as are specified in the contract. In the latter the services are of a common every day character the loss of which can be supplemented by the services of others of a substantially similar character. In the former the services contracted for are always of a unique and extraordinary character incapable of duplication.

Counsel for complainant has cited no case in which an employee has been enjoined at the instance of his employer from working for another. On the contrary as they admit the issuance of an injunction has been denied as against an insurance agent, in *Burney v. Ryle*, 91 Ga. 701, 71 S. E. 986. As against a base ball player, in *Metropolitan Exhibition Co. v. Ewing*, 42 Fed. 198, 7 L. R. A. 381. As against a lithographic designer in *Strowbridge Lithographic Co. v. Crane*, 20 Civ. Pro. 24, 12 N. Y. S. 834. And as against an acrobat in *Cort v. Lassard*, 18 Oreg. 221, 22 Pac. 1054, 17 Am. St. Rep. 1054, 6 L. R. A. 653.

It is not to be wondered at that counsel has not been able to cite cases enforcing, even negatively, by injunction the maintenance of the relation of master and servant where either party objects thereto. In the judgment of this court it is against public policy to force an unwilling servant to work for his master, or an unwilling master to keep a servant after their relations to each other become strained and distasteful. To force them into daily contact with each other under such circumstances would be fraught with much more evil consequences than might flow from the breach of the contract of employment.¹ Better far to leave them to their remedies at law, even though inadequate, than to force association and personal contact between hostile and unwilling parties.

But it may be said that there is a difference between enjoining a man from working for others and compelling him to work for one man in particular. In effect there is none. To say to a man, "Work for me or nobody," if that man be, as is alleged of defendant, without means, is to say,—“Work for me or starve.” Such a heartless edict should not go out of a court of equity. That there are cases in which courts of

equity have negatively enforced specific performance where it was impossible to do so by positive decree is not denied, but I have failed to find any arising between master and servant or employer and employee.¹ Indeed it is against the spirit of the thirteenth amendment of the constitution of the United States which prohibits "slavery and involuntary servitude" within its borders. Involuntary servitude in juxtaposition to the word slavery has a significance. So placed it cannot mean the same as slavery else it is a redundancy. It must mean, servitude outside of slavery. Outside of slavery servitude can originate only by contract. No free man can become the servant of another except by consent, to-wit, by contract. Involuntary servitude can only arise therefore after the consenting party changes his mind and becomes an unwilling servant—*involens servitor*. But, whether or not the relief sought for in this cause comes within the inhibition of the thirteenth amendment, the court is of the opinion that to grant the relief prayed for would be against sound public policy.

It is claimed that the allegation that "the knowledge and skill of defendant are peculiar and special to himself," and that "complainant cannot at the present time procure any other person possessed of the requisite skill and ability to conduct the services agreed to be performed by defendant," places the cause in the same category as the theatrical cases hereinbefore cited, and that it should be governed by the rule laid down in those cases. The court is of a contrary opinion. These allegations are mere conclusions. No facts are set out to sustain them. It does not appear that defendant is acquainted with any special or secret processes or gifted with any special or unusual dexterity. The facts alleged are that he is a skillful and expert leather worker, thoroughly competent to act as foreman, and that he was employed at \$18 a week. This does not place him in the category of a prima donna, a tragedienne or a premier danseuse.

The demurrer is sustained and the injunction dissolved.

¹ See the many cases cited in the note to 1 Ill. C. C. 86.—Ed.

NOTE.

The decision of Judge Dunne, while correct as applied to the facts in the case before the court, is clearly erroneous insofar as it holds that injunction will not lie to restrain an employee from breaking his contract of employment. Where the services of an employee are special, unique or extraordinary, injunction will lie to restrain such employee from working for others during the period of employment. The rule is not restricted to actors, singers, etc.

The authorities are fully reviewed in the note to *Oppenheimer et al. v. Sayer*, 1 Ill. C. C. 86. See also the decision of Judge Tuley in *Oppenheimer et al. v. Sayer*, 1 Ill. C. C. 74; *Jennings v. Bethel*, 27 Ohio C. C. 239.—Ed.

(Criminal Court of Cook County.)

People of the State of Illinois

vs.

Simon Arkins.

(Jan., 1901.)

1. **CRIMINAL LAW—PLEA OF GUILTY ENTERED UPON PROMISE OF IMMUNITY.** Where a person indicted for receiving stolen property is induced to enter a plea of guilty by the promise of the prosecuting witness that he will go free, the defendant is entitled to have the judgment vacated and to withdraw the plea of guilty.
2. **PLEA OF GUILTY TREATED AS A CONFESSION.** A plea of guilty is treated in the light of a confession and is subject to all the legal restrictions pertaining thereto.
3. **CONFESSIONS—WHEN ADMISSIBLE.** Confessions made by a prisoner under the influence of promises or threats are not admissible against him. Confessions induced by the appliance of hope or fear are not regarded as voluntarily made and are therefore not to be relied on as true.

Indictment for receiving stolen property. Motion to vacate judgment entered upon plea of guilty. Heard before Judge Jesse Holdom.

The facts are stated in the opinion.

Frank Crowe, assistant state's attorney, for the People.

O'Donnell & Brady, for defendant.

HOLDOM, J.:—

The defendant was indicted by the grand jury of Cook county for having received stolen property, with knowledge that the same was stolen. The property, consisting of silk linings of the value of about \$600, was stolen from Siegel Bros., by one Surney, an employe, and sold to the defendant. On being arraigned for trial at the November term of the court, the defendant pleaded guilty. The evidence both for the state and the defense was heard by the court, which being held to sustain the defendant's plea of guilty, he was sentenced to the penitentiary for an indeterminate term, under the statute.

The defendant appeared without counsel and refused the offer of the court to assign him counsel to conduct his defense.

On December 5th, and within the November term, the defendant moved the court to vacate and set aside the sentence and judgment pronounced against him by the court, and for leave to withdraw his plea of guilty and to enter a plea of not guilty, and upon issue thus joined, to be tried by a jury, upon the ground that he was in fact not guilty of the crime for which he was indicted, tried and sentenced; that while he bought the stolen goods as alleged, yet he had neither knowledge nor suspicion that the goods were stolen; that he was assured by one Fred Siegel, the prosecuting witness, after having paid him \$600, the value of the goods stolen, and which he had bought without any guilty knowledge, that the prosecution would be dropped, and subsequently when in court, assured that if he would plead guilty, the judge, after hearing the evidence, would discharge him and set him free; that he relied on such statements implicitly, and resting in the security of their verity, with the consciousness of innocence in his mind, and simply as the easiest manner in which to escape the legal clutches in which he found himself enmeshed, pleaded guilty.

Affidavits in support of this contention were filed and read with the motion.

It is in the first place insisted that the plea of guilty must

be treated in the light of a confession made by one charged with crime and subject to all the legal restrictions pertaining thereto, and that every intendment in favor of the defendant, deducible from the facts and circumstances environing and leading up to the confession evidenced by the plea of guilty, must be indulged.

That the undisputed inducement leading to the confession, viz., the plea of guilty, as shown by the sworn proof, was the assurance that such was the channel of escape, and therein lay not only the hope but the certainty of freedom. While the legal question as thus presented is not at all new, yet the circumstances of this case are novel and are not to be met with in recorded cases so far as I have been able to discover in the necessarily limited research which I have been able to make. The condition of the mind of the defendant at the time of entering the plea of guilty must not be lost sight of, and by this standard must be judged. The plea was entered on the positive unrestricted statements of the prosecuting witness, that the judge would, under that plea, after hearing the witnesses, acquit him. Without such plea—the crime being a felony—the court could not hear the case without the interposition of a jury. At common law a confession is an admission or acknowledgment of guilt. Therefore the defendant's plea of guilty in case at bar should be and is by legal construction, taken and treated as a confession.

The most instructive and thoroughly well considered case on this subject, in which all the leading cases are collated and reviewed, is *Bram v. United States*, 168 U. S. 532, opinion by Mr. Justice WHITE; and while Mr. Justice BREWER wrote a dissenting opinion in which Chief Justice FULLER and Mr. Justice BROWN concurred, the division of the court was not upon the law announced, but the dissentants, in effect, simply held that the facts of the case did not come within the purview of the legal principles promulgated in the court's opinion.

Mr. Justice WHITE said on page 542: "In criminal trials in the courts of the United States, wherever a question arises whether a confession is incompetent because not voluntary,

the issue is controlled by that portion of the fifth amendment to the constitution of the United States commanding that no person 'shall be compelled in any criminal case to be a witness against himself.' "

In Russell on Crimes, vol. 3, (6th ed.) page 478, the author says: "But a confession in order to be admissible, must be free and voluntary; that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence."

Like doctrine has been expressed by the standard writers on criminal law, such as Greenleaf, Wharton, Taylor and Bishop.¹ The administration of the criminal law and the attitude of the courts toward persons charged with crime, has much ameliorated since the Stuarts left the throne of England and the reformation dawned in law as well as religion. While confessions extorted through torture were of frequent occurrence in England to this time, yet since 1688, they have not been tolerated. Strange to say this change was not brought about by any statute, but upon a silent acquiescence on the part of the courts, growing out of a popular demand proceeding from more refined feelings of humanity and a progressive civilization of the people.

In *Brown v. Walker*, 161 U. S. 591, the court says: "So deeply did the iniquities of the ancient system impress themselves upon the minds of the American colonists, that the States, with one accord, made a denial of the right to question an accused person a part of their fundamental law, so that a maxim (*Nemo tenetur seipsum accusare*) which in England was a mere rule of evidence, because clothed in this country with the impregnability of a constitutional enactment."

That one accused of crime may not be compelled to testify against himself may be conceded to be a doctrine of the common law. In Hawkins' Pleas of the Crown, it is said: "Sec. 2. * * * And where a person upon his arraignment actu-

¹ 1 Greenl. Ev. (15th ed.) sec. 219; Wharton, Crim. Ev. (9th ed.) sec. 631; 2 Taylor, Ev. (9th ed.) sec. 872; 1 Bishop's New Crim. Proc. sec. 1217, par. 4.—Ed.

ally confesses himself guilty, or unadvisedly discloses the special manner of the fact, supposing that it does not amount to felony where it doth, yet the judges, upon probable circumstances that such confession may proceed from fear, menace or duress, or from weakness or ignorance, may refuse to record such confession and suffer the party to plead not guilty."

For reference to statements made by prisoners that were induced by the language specifically used, set out in each case, see *Bram v. U. S.*, *supra*, 552-556, 559-561.

The doctrine voiced in the decisions and statements of text writers cited has been sanctioned by the decisions of the courts of this state and forms an integral part of our legal fabric. The earliest opinion on this subject is found in the case of *Gates v. The People*, 14 Ill. 433, in which the court stated the common-law doctrine in these words: "The general rule is that confessions made by a prisoner under the influence of promises or threats, are not admissible in evidence against him. Confessions induced by the appliances of hope or fear, are not regarded as voluntarily made, and are therefore not to be relied on as true."

There is a marked difference between the case at bar and the cases above referred to, in all of which the confession was made to some officer of the law on some inducement held out or threat made by, or fear superinduced by the action of such officer, while here the inducement proceeded solely from the prosecuting witness. This court, however, can not fail to have in mind the fact that the defendant—aside from the implication arising from his plea of guilty—not only never admitted having knowledge that the property was stolen at the time of its purchase by him, but on the contrary, always denied he had any such guilty knowledge, or cause to suspect that the property had been stolen. Was the mind of the defendant at the time of the entry of his plea of guilty free to do so understandingly, or was he misled as to the real effect of that plea by the false representations which had been made to him by the prosecuting witness, that so doing was the path to freedom? I am constrained to believe from the proof, the

latter statement to embody the facts. So believing, the defendant, in my opinion, should have extended to him the benefit of the law announced in the line of decisions cited, and in the humane administration of the law should not be consigned to sojourn in the penitentiary of the state upon a plea, the effect of which he did not comprehend, and without a trial guaranteed to him under the constitution and laws of this commonwealth.

The sentence of imprisonment in the penitentiary for an indeterminate term, heretofore imposed upon defendant, and the judgment entered thereon, is hereby vacated, set aside and held for naught, and the defendant has leave to withdraw his plea of guilty and to enter a plea of not guilty.

(Supreme Court of Illinois.)

Lucia Hausen

vs.

Norman Hausen.

(Opinion filed March 24, 1885.)

HUSBAND AND WIFE—DIVORCE—CRUELTY—WHAT CONSTITUTES. A general offensive bearing on the part of the husband and the habitual use of grossly improper language to the wife are sufficient proof of cruelty to secure a decree of separate maintenance even though there are no acts of violence.

Appeal from appellate court, second district, affirming a decree of the circuit court of Lee county.

MULKEY, J.:—

This is an appeal from a judgment of the appellate court for the second district affirming a decree of the circuit court of Lee county, dismissing a bill brought by Lucia Hausen, the appellant, against her husband, Norman Hausen, the appellee, for separate maintenance. The parties have been married since the 8th of July, 1866, and, as the fruit of the marriage, have a daughter of weak mind, whose interests and welfare demand the care and oversight of her mother who is

a woman of culture, high respectability, and, in every way, well fitted to have the care and custody of the child. The evidence tends to show the father is the very reverse of the mother with respect to fitness for such a trust. And there can be but little, if any doubt, the interests of the child will be best conserved by committing her to the care of the latter. The parties are estranged and have for some time been living apart, and an examination of the testimony justifies the conclusion there is no probability they will ever again be reconciled. The evidence of Mrs. Hausen brings the case clearly within the principles announced by this court in *Farnham v. Farnham*, 73 Ill. 497, and we have no disposition to modify anything that was said in that case. In this, as in that, the chief ground of complaint is the general offensive bearing and habitual use of the grossly improper language of the husband to his wife, which is simply intolerable to any woman of refinement and culture, as the evidence clearly shows she is. We cannot set forth the language attributed to him for the reason that it is so grossly obscene and profane as to shock every sense of propriety and decency, and consequently it is not fit matter to be reproduced in a judicial opinion. It is true the husband denies most of the charges which his wife makes against him, and a number of their acquaintances and neighbors are called in who testify they never saw or knew of any improper conduct on his part or of any difficulty between them. So far as this negative testimony is concerned we do not attach much importance to it. It is altogether unlikely that one guilty of the conduct attributed to the appellee would be so reckless and indifferent to public esteem and the respect of his neighbors as to expose himself by the commission of such gross improprieties in their presence. Appellant, himself, swears that his conduct and bearing toward her in the presence of others than the servants and her own people was always respectful and proper, hence these witnesses do not at all contradict her. While for the reasons already stated, we are not permitted to set out the details of her testimony, yet we cannot do less than say there is much in it that carries with it the conviction of its truth. There are many expressions in it that could scarcely have been

manufactured by a chaste, refined woman as she appears to be.

Besides this she is strongly corroborated by a number of disinterested witnesses, some of whom were former servants in the family, while on the other hand, he is not corroborated at all except so far as the negative testimony above adverted to may be deemed a corroboration. In short, we think, the decided weight of testimony is with the appellant and that the circuit court erred in not entering in her favor.

The judgment of the appellate court will therefore be reversed, and the cause remanded with directions to that court to reverse the decree and remand the cause with directions to the circuit court to ascertain by reference to the master, or otherwise, what will be a reasonable allowance out of the husband's estate for the separate maintenance of appellant and their daughter, and to enter a decree securing and providing for its payment according to the prayer of the bill and the provisions of the statutes in that behalf.

Reversed and remanded.

NOTE.

The above opinion was found among the papers of Judge Tuley. There was a note attached thereto as follows:

"The defendant never struck his wife—never inflicted any bodily injury whatever upon her. He simply threatened to beat her."—Ed.

(Circuit Court of Cook County.)

The People ex rel. Wm. N. Sturges

vs.

Board of Directors etc. of The Board of Trade of Chicago.

(January 17, 1878.)

1. **MANDAMUS TO REVIEW ACTION OF BOARD OF DIRECTORS OF VOLUNTARY ASSOCIATION.** Where a party has a legal remedy and has not been disturbed in any of his rights as a member of the board of trade except the right to prosecute a member for the non-payment of a claim, but has been deprived of that right by

- a decision of the board of directors, that they would not entertain it for reasons deemed by them, in the exercise of their discretion and judgment, to be good and sufficient, it was *held*, that mandamus would not lie.
2. SAME—PARTY DEFENDANT. Where it was sought to affect the rights of a party and to compel his trial, upon a petition of mandamus to which he was no party, and of which he has had no notice, it was *held*, that under sec. 7 of the mandamus act where a party has an interest in the subject-matter he could be made a party defendant.
 3. SAME—ADEQUATE REMEDY AT LAW AS DEFENSE. An adequate remedy at law is a defense to an application for a writ of mandamus where such writ would not afford a proper and sufficient remedy.
 4. SAME—WHAT IS A SUFFICIENT REMEDY. In an application for a writ of mandamus to compel a board of trade to suspend one of its members for failure to pay a debt due to the relator it was *held* that the writ did not afford the relator an adequate remedy as the suspension of the member would not necessarily cause the debt to be paid.

McCoy & Pratt and Monroe, Bisbee & Ball, attorneys for plaintiff.

Dent & Black, attorneys for defendant.

ROGERS, J.:—

If we are to regard the case of *The People ex rel. Thos. B. Rice v. The Board of Trade of Chicago*, 80 Ill. 134, as authority, then it is clear that the petition for a mandamus in this case cannot be sustained and that the answer to it presents a perfect defense. It is the latest decision of our supreme court upon the questions involved in it; and while it has not given satisfaction to many of the members of the bar, and perhaps not to some of the judges of the courts, yet it has not been recalled nor overruled, and is therefore binding upon the inferior courts of the state. It is suggested that the supreme court has consented to a review of the questions, and it is hoped and expected by the counsel in a case now pending in that court that the decision in the Rice case will be overruled. I do not, however, feel that it is becoming in me, if indeed I have the legal right, to disregard and reject

the authority of that case, even if I entertained a different opinion and doubted its correctness.

But without the authority of that case, and admitting that the courts will interfere to control the enforcement of the rules and regulations of such associations, whether merely voluntary in its strictest sense, or created and maintained for the transaction of business or for the pecuniary gain of its members and the acquisition of property and profits in which its members have a direct interest, still does the present case demand the interference of the court, and does the answer filed by the defendants to the petition of the relator, and to which a demurrer has been filed, present a good and sufficient defense. By filing a demurrer the relator admits all the material facts set up in the answer. Those facts are not very different from the allegations of the petition, and as the decision of the demurrer to the answer will, in effect, be the same as upon a demurrer to the petition, I will consider the questions in that view.

The petition is filed by W. N. Sturges, a member of the board of trade of this city, praying for a mandamus to compel the board of directors of said board of trade to proceed and try Geo. Webster, another one of its members, upon a complaint brought under the rules of the corporation.

The complaint is that Webster had refused to comply with a contract made by him with Sturges, for the purchase of corn, setting out that he had been delinquent in payment of margins called and that Sturges had purchased the corn and paid therefor upon Webster's account, and that Webster had refused to pay the bill presented with the complaint. The petition avers that the board of directors had refused to entertain this complaint, and thereby deprived Sturges of the means of compelling, under the rules of the association, a speedy adjustment of the difference between him and Webster, and that he was prevented from the exercise of, and denied, the privileges and rights to which he was entitled as a member of the board of trade.

The right to have Webster tried, for not paying Sturges' bill, is the only one which he claims, was denied to him, and

to enforce that right by mandamus is the only object sought by the petition. As a result of such trial, if Webster was suspended from his privileges and rights as a member of the board of trade, so far as it concern Sturges, is the expectancy, that Webster, to relieve himself from such suspension, would pay the bill of petitioner.

The real object, therefore, of the complaint made to the board and of this petition for mandamus, is to collect or try to collect a debt. It is not claimed that any other right or privilege of a member of the board of trade has been denied to the relator. He still has the privilege, by his own showing and by that of the answer, of going upon change and trading and being traded with, and in every other respect enjoying all his rights, privileges and franchises; nor is he deprived of any right of, or interest in, the property of the corporation. He has exercised the right to make a complaint against his fellow member under sec. 7 of rule 4 of the board. That complaint was considered as stated in the answer, and upon consideration in a meeting of the board of directors, as shown by the letter of the secretary of the board, copied in the petition and averred in the answer, "it was voted that the complaint . . . be not entertained by the board." This disposition of it, and its return to the petitioner, he regards as a refusal to receive the complaint and a denial of his right to have the trial of Webster upon the complaint; while the defendants set it up as a consideration and disposal of the complaint, by the board, in the exercise of its discretion and judgment. This would seem to be so. It was presented at a meeting of the board; it was considered, and they decided by a vote that "it be not entertained." The reasons for such a disposition of it are not shown. Nevertheless, there was action upon it, and by a vote taken it was disposed of. Whether because the complaint was not sufficiently certain or did not present an offense, in the opinion of the board, which was a subject of complaint and trial, does not appear. Upon examining the complaint, and the rule of the board under which it was made, it appears to me that it was not such as in such cases should be required. That it would be quashed by a

court, if it was on information or indictment, or that a demurrer would be sustained to it for not sufficiently setting out the offense complained of, I have no doubt. The petition alleges it was made under sec. 7 of rule 4 of the board, which prescribes that, "When any member of the association has failed to comply promptly with the terms of any business contract or obligation, *and* has failed to equitably and satisfactorily adjust and settle the same, . . . he shall, upon admission or proof of such delinquency, before the board of directors, be by them suspended," etc. Now the complaint was "non-fulfillment of contract as per bill inclosed, which he refuses to pay," and "for delinquency of margins being called which he refused to deposit," but there is no statement in the complaint that he had "failed to equitably and satisfactorily adjust and settle the same." It has been seen that he must have failed to comply with the terms of a business contract *and* failed to equitably and satisfactorily adjust and settle the same before he could be suspended. That he failed to furnish margins, and upon relator's buying in and paying for the corn, upon Webster's account, and Webster's failure to pay the bill—in other words, his failure to comply with the terms of the contract—is not, under sec. 7 of rule 4, an offense for which he could be tried and suspended. There must have been also a failure to "equitably adjust and settle the same." This is not a technical but a substantial objection to the complaint. A member may refuse to pay a claim because it is unjust, in whole or in part, without an infraction of the rule in question. But if there is a claim of failure to fulfill a contract, and he also refuses and fails to adjust and settle it, then he is liable to the discipline prescribed.

To refuse to fulfill a contract or to pay a bill is one thing, to refuse to adjust and settle a difference is another and very different thing, and both must concur to make the offense described in the seventh section.

To adjust and settle requires concurrent action, an agreement by the parties and settlement of differences. The rule contemplates an effort between the parties to adjust and settle a difference which may arise in a business contract, and

such an effort is required by the letter and spirit of the rules and regulations of the board, and is consonant with the principles and usages of honorable and fair dealing merchants. The members of the board of directors, while not lawyers, are no doubt very intelligent business men, and could hardly fail to see that such a complaint as was presented against Webster did not contain a charge of failure "to comply with the terms of a business contract" and a failure (also) "to equitably and satisfactorily adjust and settle the same." They were required, then, to decide that the complaint should be dismissed or entertained. If such was the reason, then it was clearly the exercise of a sound discretion and correct judgment, in the exercise of which, it is well settled, courts will not interfere. Mandamus "will not lie to compel an inferior court to reverse its action in refusing to dismiss" (or, I add, in dismissing) "a bill of complaint, since in passing upon such dismissal the court must necessarily have exercised its judicial functions." High on Extraordinary Remedies, sec. 173.

Nor will it lie to control corporate officers in the discharge of duties concerning which they are vested with discretionary powers, *id.* sec. 278. The power exercised by the board in the Webster complaint was quasi-judicial, conferred by the rules of the board, to which the relator subscribed and by which he is bound.

Then there is a specific legal remedy for relator's grievance—he can recover his debt, if it exists, by an ordinary action at law. "The firmly established rule and fundamental principle underlying the entire jurisdiction (of the courts), that the existence of another specific legal remedy, fully adequate to afford redress to the party aggrieved, presents a complete bar to relief by the extraordinary aid of a mandamus," unless the recent statute of this state, in force from July 1, 1874, has changed that rule. Sec. 9 of that act provides that "the proceedings for a writ of mandamus shall not be dismissed nor the writ denied because the petitioner may have another specific legal remedy where such writ will afford a proper and sufficient remedy." But, if the writ will not afford a

sufficient remedy, then the rule remains, and the writ will or should be denied. What, then, is the remedy sought, and would it be sufficient for the purpose of the relator, viz., to collect the debt claimed to be due him. He seeks to compel the board to try Webster, and if they find him guilty, the award or judgment would be, not to pay the debt, but to suspend him from his privileges as a member of the corporation until he did pay it. The suspension would not *necessarily* afford the remedy. Webster could abide the suspension and still refuse to pay the debt, and the board would be powerless to compel the payment. They could threaten and punish by their suspension, and that would be all, so far as they were concerned, and the relator would then be compelled to resort to a court, with power not only to give judgment, but execute it by sale of the property of the debtor. It is true the fear or the fact of suspension might lead to an equitable adjustment and settlement of the claim, but that possibility or even probability is hardly a proper and sufficient remedy. If not, then the court can properly deny the writ, because the relator has a specific legal remedy, which he can pursue. Again, this writ is not a writ of right—it is discretionary with the court whether to award it, *People v. Hatch*, 33 Ill. 9. In this case Sturges has a legal remedy—he has not been disturbed in any of his social, business or property rights as a member of the board of trade except the right to prosecute a member for the non-payment of a claim (which may or may not be disputed), *but* has been deprived of that right by a decision of the board of directors, that they would not entertain it, for reasons deemed by them, in the exercise of their discretion and judgment, to be good and sufficient, and that, in a matter not materially, if at all, affecting the public interest, but of private interests, namely, to the relator and Webster. And it does not appear to me to be a case which requires the exercise of a discretion or the resolving of doubts, if I had any, in favor of the petitioner.

Another thing entitled to consideration is, that it is sought to affect the rights of Webster and to compel his trial, upon a petition for mandamus to which he is no party, and of which

he has had no notice. Under sec. 7 of the mandamus act (as he has an interest in the subject-matter), he could be made a party defendant.

The facts set out in the answer, without reference to the allegations as to the status of Sturges as a member of, or his past relations to, the board, present, in my opinion, a clear defense to the petition. He is a member of the association, notwithstanding the suit referred to in the answer, and I have not, therefore, given any weight to the facts set out in the answer upon that subject. The demurrer to the answer is therefore overruled. Demurrer overruled.

NOTE.

Before the reading of this opinion Judge Rogers stated to counsel that had he had formed his judgment of the case and wrote out his opinion before the decision of the Supreme Court in *Sturges v. Board of Trade*, filed at Ottawa, January 21, 1878 (86 Ill. 441), which case counsel had suggested brought into review the decision in *Rice v. Board of Trade*, 80 Ill. 134, and that he had supposed the counsel would take some action, either by petition to dismiss or by defendants to amend the answer by setting out the fact that Sturges was no longer a member of the board of trade; but no suggestion being made by either counsel, Judge Rogers read the opinion as prepared. —Ed.

(Supreme Court of Illinois. Central Grand Division.)

N. W. Edwards, et al.

VS.

The People.

(January Term, 1878.)

APPEAL—APPLICATION FOR LEAVE TO BECOME PLAINTIFF IN ERROR.

Application to permit other persons against whom judgment for taxes was rendered to become parties plaintiff in error denied on the ground that the judgment against each separate tract of land is separate and distinct.

WALKER, J:—

In this case there is an application to permit other persons against whom the judgment was rendered for taxes to become

parties plaintiff in error in the case. The decisions of this court have held that while the proceeding is against all the delinquent lands, the judgment against each tract of land is separate and distinct, and that it is not a joint judgment, but a several judgment. The practice is not to admit parties in other cases to come in and make themselves plaintiffs in error, while they were not joint defendants in the court below, in the case that is brought to this court. We are not willing to establish a practice that parties who are parties to another suit, a several judgment, distinct from the judgment before the court, should come in and make themselves parties plaintiff to a writ of error brought to this court. The motion will therefore be denied. The parties to other several judgments have the right of course to prosecute error. Motion denied.

DICKEY, J: In this case, in which Justice Walker has announced the decision of the court, I desire to say that in my own view it is a common judgment, although separate, two-fold in its character, and that it is competent for several of those against whom judgment has been rendered to unite in an appeal and writ of error, and that the application ought to be allowed.

NOTE.

See same case 88 Ill. 340.—Ed.

(Supreme Court of Illinois. Grand Central Division.)

T. W. & W. R. R. Co.

vs.

Lloyd L. Grable.

(January Term, 1878.)

CONTINUANCE. Application for continuance by appellee so that the record may be reformed as to the form of the judgment denied where appellant withdraws assignment of error.

DICKEY, J:—

Application is made by the appellee for a continuance, that the record may be reformed as to the form of the judgment. This application is resisted by the appellant. It is alleged that due diligence might have reformed the record before this time. The court does not see how the appellant can be injured by the delay. The appellee is the one whose collection or judgment is delayed by continuance. And there are several errors assigned, and among them there is an error assigned which changes this judgment on account of its form. If the appellant desires to waive that exception or ground of error, which is merely technical and formal, of course there will be no ground of continuance.

Attorney for appellant: I take the liberty to withdraw that exception, ground of error.

DICKEY, J: Then of course the motion will be overruled.

NOTE.

See same case 88 Ill. 441.—Ed.

(Supreme Court of Illinois. Grand Central Division.)

Miller, et al.

vs.

Beckley, et al.

(January Term, 1878.)

INJUNCTION. Motion to withdraw injunction bond on file.

CRAIG, J:—

Motion is made in this case by appellant to withdraw the injunction bond which was filed. It has not been the practice of this court to allow papers filed to be withdrawn, but in this case the controversy between the parties has been settled, and there is a stipulation which is signed by both par-

ties that the appellant may have leave to withdraw this original injunction bond. We cannot see that it will work any damage to any one. The case has been settled. We will allow it to be withdrawn upon leaving a copy on the files.

(Supreme Court of Illinois. Grand Central Division.)

Isaac J. Ketchum

vs.

Servetus N. Thorp.

(January Term, 1878.)

APPEAL. Motion to dismiss founded upon a clerical error of clerk denied.

DICKEY, J.:—

A motion in this case is made to dismiss the appeal. It was founded upon a clerical error of the clerk in preparing the transcript, which is corrected by an amendment on record. The motion is overruled.

NOTE.

See same case 91 Ill. 611.—Ed.

(Supreme Court of Illinois. Grand Central Division.)

Addison C. Taylor, et al.

vs.

Commissioners of Highways, etc.

(January Term, 1878.)

APPEAL. Motion to dismiss for want of sufficient bond denied and amendment permitted.

SCOTT, J.:—

There was a motion on the part of the appellee to dismiss the appeal for want of a sufficient bond. Part of the appel-

lants not being parties to the same and also a cross motion on the part of the appellants for leave to amend said bond, for the purpose of adding the parties, the motion to dismiss would be denied and the cross motion allowed, with an extension of time to the 9th inst., within which to make the proposed amendment.

NOTE.

See same case 88 Ill. 526.—Ed.

(Circuit Court of Cook County.)

J. V. Farwell & Co.

vs.

E. Miller.

(January Term, 1878.)

JUDGMENT BY CONFESSION—PAROL EVIDENCE TO VARY WRITTEN INSTRUMENT. Oral agreement that judgment note should be held until the happening of a contingent event can be shown upon application to vacate the judgment and such evidence does not vary the written instrument.

The note on which judgment was confessed was given by defendant to plaintiff's agent, and it was orally agreed that it should be held by him until the happening of a contingent event. Before the happening of the contingency Farwell & Co. confessed judgment.

Defendant seeks to vacate judgment, stay execution, and for leave to plead.

Edwin F. Abbott, attorney for plaintiff.

It was contended for plaintiff that the evidence of the contemporaneous agreement was not admissible to vary the terms of the contract, it being absolute on its face.

And on the part of the defendant it was alleged that defendant did not seek to vary the terms of the agreement, but to show that the agreement had never taken effect; that there was an oral agreement constituting a condition precedent to the note and power of attorney becoming operative, and that

the condition had not happened, and that defendant should be allowed to interpose that defense.

W. A. Day, attorney for defendant.

Defendant's counsel cited the following cases: *Pym v. Campbell*, 6 Ellis & Blackb. 370; *Wallis v. Littell*, 11 C. B. N. S. 369; *Clark v. Gifford*, 10 Wend. 310; 1 Greenl. on Ev., Redfield ed., sec. 284a; Stephens' Dig. of Ev., p. 89, sec. 3; *Bell v. Lord Ingestre*, 12 Q. B. 318 (E. C. L., vol. 64).

MCALLISTER, J.:—

The defense here sought to be interposed is analogous to the delivery of a deed as an escrow. Defendant does not seek to contradict the writing, but to show that the writing never became operative.

The terms of the note cannot be varied by parol evidence; but in the present case the defense begins one step earlier. The defendant delivered the note and warrant of attorney to a third party, with the understanding that they were not to take effect except upon the happening of a contingent event, the contingent event never happened.

This is the *prima facie* case presented. I think the defendant is entitled to plead his defense, and have it submitted to a jury.

(Superior Court of Cook County.)

The Fidelity Savings Bank & Safe Depository, Use of Virginus A. Turpin, Receiver,

vs.

George Shufeldt, Jr.

(1878.)

1. **PLEADING—ASSUMPSIT.** A plea of the general issue in assumpsit, that the defendant did not "promise in manner or form" omitting the words "undertake or" is bad on demurrer.
2. **COLLATERAL SECURITIES—DUTY OF CREDITOR TO SELL.** The creditor is not obligated to sell securities which he holds as collateral to an indebtedness even though the debtor requests him to do so.

General No. 69,821. Assumpsit. Plaintiff sues on a note, to secure which certificate of stock of Fidelity Bank & Globe Insurance Company were deposited as collateral, declaration, special and common counts, copy of note sued upon and affidavit of claim. Defendants filed a plea of *non assumpsit* in substance and form the same as that filed in *Chisholm et al. v. McGinnis*, Chicago Law J., vol. 1, No. 1, p. 56,¹ and notice of set-off; to which plaintiff demurred. The demurrer was disposed of at February term, 1878, as follows:

Plummer & Bradford, attorneys for plaintiff.

Shufeldt & Westover, attorneys for defendants.

GARY, J.:—

Let the demurrer be sustained, as decided in *Chisholm v. McGinnis*.

Mr. WESTOVER: The defendants ask leave to amend.

GARY, J.: You can do so, on filing an affidavit showing that you have a good defense.

To this defendants file an affidavit setting up that the stock deposited was, at the time deposited, valuable, and that while valuable defendant notified plaintiff to sell and apply proceeds to payment of note sued upon. This plaintiff neglected to do, and defendant was damaged thereby, and asks to have his damages set off against this action.

Mr. BRADFORD: This is no defense in law, and I refer your honor to the following cases: *Prettyman v. Barnard*, 37 Ill. 109; *Rozet v. McClellan*, 48 Ill. 347; Story on Bailments, secs. 308-321; *Henry v. Eddy*, 34 Ill. 508; *Cashman v. Hays*, 46 Ill. 145; *Leake v. Brown*, 43 Ill. 372; *Belden v. Perkins*, 78 Ill. 449; *Chicago Artesian Well Company v. Corey*, 60 Ill. 73; *Coggs v. Bernard*, Smith's Lead. Cas. vol. 1, pt. 1, 384.

Mr. WESTOVER: I refer your honor to 28 Minn.

GARY, J.: Plaintiff was not bound to sell collaterals which defendant had the right at any time to redeem. He did not do so, and could not force plaintiff to the expense and trouble of sale or litigation. Let the plea be stricken out for want of sufficient affidavit of defense. Plea stricken and judgment \$4,751.28. Appeal prayed and allowed.

¹ Reversed in part 93 Ill. 597.

(*Supreme Court of Illinois. Northern Grand Division.*)

Felix K. Misch, et al.

vs.

Minor N. Knowlton.

(January 21, 1878.)

AFFIDAVIT OF MERITS—STIPULATION TO VACATE JUDGMENT—RIGHT OF COURT TO IMPOSE CONDITIONS. Where it was stipulated and agreed "by counsel and by the court" that judgment might be entered against the defendants for \$408.15 and that if the defendants should by affidavit show a good defense to the suit, upon the merits, the judgment should be set aside; and subsequently the affidavit of one of the defendants was filed, showing a meritorious defense to all of the note upon which the judgment had been rendered, except \$81.27, and a motion was made to vacate the judgment, but the court refused to grant the motion unless the defendants would actually pay plaintiff the amount conceded to be due by the affidavit; it was *held* to be error.

Appeal from superior court of Cook county.

PER CURIAM:—

This was an action of *assumpsit*, brought by appellee to recover a balance claimed to be due upon a promissory note; to the declaration appellant interposed a demurrer, and at the same time entered a motion to strike from the files the affidavit of claim, on account of certain supposed defects it contained; the court overruled the demurrer, and denied the motion to strike from the files the affidavit, but, as appears from the bill of exceptions contained in the record, it was then stipulated and agreed in open court "by counsel and by the court" that judgment might be entered against the defendant for \$408.15, and that if the defendants should by affidavit show a good defense to the suit, upon the merits, the judgment should be set aside. Subsequently the affidavit of one of the defendants was filed, showing a meritorious defense to all of the note upon which the judgment had been rendered, except \$81.27, and a motion was made to vacate

the judgment, but the court refused to grant the motion unless the defendants would actually pay plaintiff the amount conceded to be due by the affidavit. In this we are of opinion the court erred. When appellants filed an affidavit which complied with the stipulation under which the judgment was rendered, they were entitled to have the judgment vacated, and had a right to plead. The court had no power to impose a condition not embraced in the stipulation. It was no part of the stipulation that defendants should pay any part or parcel of the plaintiff's demand, and all that they could be required to do was to file an affidavit which declared a meritorious defense. This they did, and the judgment should have been set aside, and defendants allowed to plead.

For the error indicated, the judgment will be reversed and the cause remanded. Judgment reversed and remanded.

(Supreme Court of Illinois. Northern Grand Division.)

James Mix

vs.

**The People, on the application of C. P. Singest, County
Treasurer.**

(September Term, 1877.)

1. **TAXES—APPLICATION FOR JUDGMENT FOR—BURDEN OF PROOF.** An application for judgment for delinquent taxes is a summary proceeding and the burden of proof is upon the party whose lands are charged. The court presumes that the assessor performed his duty.
2. **SAME—TRIAL BY JURY.** In an application for judgment for delinquent taxes the delinquent is not entitled to a trial by jury.
3. **SAME—CHANGE OF VENUE.** In an application for judgment for delinquent taxes the delinquent is not entitled to a change of venue.

Appeal from the county court of Kankakee county: Hon.
C. R. Storr, presiding. Opinion filed January 21, 1878.
Stephen R. Moore, attorney for appellant.

BREESE, J., delivered the opinion of the court:—

This is an appeal by James Mix from the county court of Kankakee county on the application of the county treasurer and collector of that county, for judgment against the lands of appellant alleged to be delinquent in the payment of the taxes assessed against the same.

The points made on this appeal are: First, that a motion for a change of venue was denied; second, that a trial by jury was refused; third, there was no proof that the property had been assessed; fourth, it was error to admit in evidence the delinquent list.

No one of these objections is tenable. An application for judgments for delinquent taxes is a summary proceeding, and governed by the revenue act. The act in relation to change of venue and to trial by jury have no application to such a case. It is not a suit in legal parlance.

It has been often held by this court that the party whose lands are charged as being delinquent must make the proof. It is not incumbent on the collector to prove it, for it is an act, with which he is not in privity. He is not required to make any proof of the acts of the assessor. *Durham v. The People*, 67 Ill. 414. The presumption is, the assessor and all other officers performed their duty.

The revenue act makes the collector's return of the lists of delinquent lands evidence. Parties can make objections at the proper time, if there be any. It is for the land-owner to point them out. So far as we can discover, the writ in this case complied with the statute.

The other points are settled by *Buck v. The People*, 78 Ill. 560, and *Mix v. The People*, 81 Ill. 118.

The judgment must be affirmed. Judgment affirmed.

(*Supreme Court of Illinois.*)

Martha E. Emmons, et al., etc.

VS.

Catherine Moore.

(January Term, 1878.)

REHEARING. Correction of expressions in opinion.

Scoville & Bayley, for appellants.

Sleeper & Whiton, for appellee.

CRAIG, J.:—

There is a petition for a rehearing, which has been examined, but the court do not see sufficient ground to disturb the judgment that was entered when the cause was considered. The petition will be denied. We will, however, take occasion to correct some expressions in the opinion, not, indeed, to change the judgment in any respect.

See 85 Ill. 304.—Ed.

(*Supreme Court of Illinois.*)

Peters

VS.

Banta.

(January Term, 1878.)

APPEAL. Appeal will not be dismissed because bill of exceptions is stricken out of record.

WALKER, J.:—

There is a motion entered to dismiss the appeal because the bill of exceptions has been stricken out. We can see no reason for dismissing the appeal because there is no bill of exceptions. A party can appeal without a bill of exceptions if he wants to raise questions independent of the proceedings had upon the trial before the jury. The motion will be denied.

(Supreme Court of Illinois.)

Francis M. Richardson

vs.

Henry Deming.

(January Term, 1878.)

JURISDICTION. Appeal dismissed for want of jurisdiction.

CRAIG, J.:—

There is a motion to dismiss the appeal. It appears from the record that this was an action in assumpsit, and the amount recovered was \$75; the judgment being recovered on the 7th of August, when an appeal was taken to this court. An appeal in this case does not lie to this court, but since the establishment of the appellate courts should have gone to that tribunal. The appeal will be dismissed, and leave will be given to withdraw the record, if desired, in order to take an appeal to the proper court.

(Supreme Court of Illinois.)

The Howe Machine Co.

vs.

Sam. Layman, etc.

(January Term, 1878.)

BRIEFS. Motion for extension of time to file.

WALKER, J.:—

There is a motion by appellant for further time to file brief. In this case the court thinks there are grounds for an extension of the time. The time will be extended six days. That, however, will carry it past the call. The case will be taken when it is reached on the call, unless appellee shall object, and if the party applying fails to comply with the rule for extension of time by filing his brief, the submission will be set aside and the judgment affirmed.

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(Supreme Court of Illinois.)

The People on the Relation of Glenn

VS.

Thos. S. Needles.

(January Term, 1878.)

MANDAMUS. Leave to file petition for. If respondent demurs to petition no process is necessary. Where only private interests are involved case will not be advanced.

SCOTT, J.:—

In this case the motion is for leave to file a petition for a mandamus. We see no reason why leave should not be granted to file the petition. As the attorney-general has entered a demurrer to the petition there is no necessity for awarding process. Only private interests are involved in the litigation and the case will be placed upon the docket and called in its regular order.

(Circuit Court of Cook County. In Chancery.)

Martin

VS.

Fee.

(Dec. 24, 1877.)

PRACTICE—MOTION FOR A RESTRAINING ORDER—AFFIDAVIT NOT ENTITLED IN THE CASE, ETC.—AMENDMENT. Where an affidavit is made and filed in a case, and duly entitled therein, before an amendment to the bill is made and filed, it is properly entitled in the cause and will stand as to a subsequent amendment. One good affidavit supporting the facts in the bill is sufficient to ground a motion for a restraining order.

Motion for restraining order. Heard before FARWELL, C. J.
Gen. No. 27,234.

Mr. KERR: Your honor, I wish an injunction or a restraining order.

Mr. KING: His bill is not good for anything. It is not verified. The so-called amendment is not embodied in it.

Mr. KERR: There are affidavits in support of the amendments.

Mr. KING: The amendment has no venue or jurat. You might as well file a newspaper.

FARWELL, C. J.: He says that the facts herein stated are verified by affidavit.

Mr. KERR: We don't make any defense as to the title to these goods. They are simply pledged. One man has the custody and the other the warehouse receipts. What we want is to have the goods remain *in statu quo*. We want a restraining order for our protection.

Mr. KING: The affidavits are neither of them entitled in the case. The last don't appear to be entitled in either case.

FARWELL, C. J.: What is the objection to the first affidavit?

Mr. KING: The objection to the first is that it is not entitled in the case; and to the second one, that it is not entitled in any court.

FARWELL, C. J.: The first one is entitled in the case as it was before the amendment. This affidavit was made before the amendment in fact was made, and when the affidavit in fact was made, there was such a suit in court, so that they would be bound by the affidavit. He took leave to amend and did not amend. I think it will stand. If there is one good affidavit stating the facts, that will probably be sufficient. The first one, I think, is entitled in the case as it then was. He will be guilty of perjury if that was not true when made. I don't know why they can't use a paper filed in a case before the amendment. It would not be necessary, because of an amendment, to have the parties all sworn over again.

(*Superior Court of Cook County.*)

Max Stern

vs.

George Eager, et al.

(December Term, 1877.)

PRACTICE—APPLICATION TO WITHDRAW DEMURRER AND PLEAD OVER IN AN ACTION ON AN APPEAL BOND WHERE NO DEFENSE IS SHOWN. Leave will not be granted to withdraw a demurrer and plead over, unless there is an actual defense shown by affidavit setting up the extrinsic facts relied upon.

Demurrer to plaintiff's declaration. Gen. No. 69,142.

Philip Stein, attorney for plaintiff.

Ricaby & Landis, attorneys for defendant, Curtis.

Mr. LANDIS: Your honor, this is a demurrer to the plaintiff's declaration. I ask leave to withdraw the demurrer and file a plea.

GARY, J.: I would not permit any pleading over unless there was an actual defense shown.

Mr. LANDIS: This was an action on an appeal bond, on an appeal to the appellate court.

GARY, J.: Then you have got your objection on the record. If the bond is an invalid one, then you have your objection on the face of the record. If the question is one of law on the face of the bond, you don't need to plead over. If the question is one of fact, why then, unless he (plaintiff's counsel) consents, you can show by affidavit what the extrinsic facts are before I can give leave to amend in a case of this sort. You will have to set up what the circumstances are in order to get leave to amend. The plea and the affidavit must be presented first.

Mr. LANDIS: I think this is a case where we ought to be allowed to plead over.

GARY, J.: I believe the declaration recites that the appellate court made a rule that you should file an additional and further appeal bond, which you did not do. Under the 70th preme court shall be dismissed by reason of any informality

section of the practice act, "Hereafter no appeal to the superior insufficiency of the appeal bond, if the party taking such appeal shall, within a reasonable time, to be fixed by the court, file a good and sufficient appeal bond in such cause, to be approved by said court." Now the declaration avers that the case was taken to the appellate court, and that you did not file any *new* bond. Now whether the bond which procured the stay of execution from the time that the bond was filed by the circuit court until the appeal was dismissed in the appellate court is a binding obligation which may be collected from the defendants is a question of law which appears upon the record. You don't need to appeal. If it is bad, then upon the demurrer the judgments should be a bar to the defendants. So there is nothing to plead.

MR. LANDIS: We want to show wherein it is bad.

GARY, J.: Whether it is good or bad appears on its face. If you have any case showing that the neglect to put in that bond to the first district—that is the apparent defect, that it don't recite an appeal to the first district,—it simply recites an appeal to the appellate court,—then I will hear you. If not, then let the demurrer be overruled and judgment go for the plaintiff. Leave to plead denied. Motion denied.

(Superior Court of Cook County.)

Anonymous.

PRACTICE. 1. Leave to reply double—Replication *de injuria*, when allowable. 2. Notice of motion—When necessary.

COUNSEL: I ask leave to reply double.

GARY, J.: Have you given any notice of the application to reply double?

COUNSEL: You gave me leave to reply.

GARY, J.: I gave you leave to reply, but that was not a *double application*. Why don't you reply generally? The replication *de injuria* would be applicable in that case. Look in Smith's Leading Cases as to the replication *de injuria* as to the action of assumpsit. *Crogate's Case*, 1 Smith's Lead. Cas. part I, pp. 247-262. I don't make any order without

notice to the other side. I don't give leave to reply double without notice. Whenever there is necessity to apply to the court there must be notice to the other side.

'(Superior Court of Cook County.)

Anonymous.

PRACTICE—TROVER. No affidavit of merits required in action of trover.

MR. COWEN: Your honor, 6360. I want to move the court for a default in that case for want of a plea and affidavit of merits. It is an action of trover.

GARY, J.: There is no affidavit of merits wanted in an action of trover. The statute don't require it.

MR. COWEN: Yes, but there is a contract there your honor.

GARY, J.: That don't matter. An action of trover can't be based upon a contract for the payment of money. There is nothing in that. Motion overruled.

(Superior Court of Cook County.)

Anonymous.

APPEAL. To superior court by one defendant. Service on co-defendants.

GARY, J.: Where an appeal is taken to the superior court by one of several defendants, there must be service on the other defendants before you can proceed in that court.

(Superior Court of Cook County.)

Anonymous.

(January 5, 1878.)

CONTINUANCE. By stipulation of counsel after a suit is set down for trial by the court.

Plaintiff's counsel asked for a continuance until the following morning at 10 A. M.

GARY, J.: The case has been set for trial and I have no right of my own motion to grant a continuance. If you will stipulate for a continuance you may arrange it between yourselves. If you will stipulate not to non-suit, the other side can safely consent to a continuance.

Mr. STORES: We will stipulate not to non-suit or get beat either.

GARY, J.: You had better stipulate not to non-suit first.

Mr. STORES: We will, your honor.

(Circuit Court of Cook County.)

John L. Beveridge, for Use of Oliver Smith

VS.

Estate of M. O. Walker.

(January 14, 1878.)

BAIL. Where a claim on a bail bond is filed against the estate of the surety in the bond, the evidence must show that the bond required by the statute was taken according to every requirement of the law, or it will be illegal and void, and where the evidence shows affirmatively that it was not so taken such claim will not be allowed.

Miller & Frost, attorneys for plaintiff.

E. A. Small, attorney for defendant.

ROGERS, J.:—

The statute in force when the bail was taken, in the original suit of *Smith v. Aylesworth*, required (1) an affidavit setting out the nature and cause of action, with the facts in relation thereto, to be delivered to the clerk of the court, who (if upon examination thereof he was satisfied that sufficient cause was shown) issued (2) a *capias ad respondendum* for the arrest of the defendant, (3) with an indorsement thereon of an order specifying in what amount the defendant should be required to give bail; (4) which writ the sheriff was re-

quired to serve and to take bail accordingly; that is, (5) a bail bond to himself, with sufficient security in a penalty double the sum for which bail was required; (6) and this bond was to be returned with the writ on the first day of the term of the court to which the writ was returnable. (7) The bail so taken was deemed special bail, and could be proceeded against by action of debt, in the name of the plaintiff in the original action, except when the bail was adjudged insufficient by the court; but no suit could be commenced upon such bail bond until a *capias ad satisfaciendum* had been issued against the defendant in the original suit and been returned that the defendant was not found in the county in which he had been arrested. In this case, a claim on bail bond, filed in the county court by *Smith v. The Estate of M. O. Walker, deceased*, security in the bond, which is here on appeal from that court, it appears, by proof satisfactory to me, that the plaintiff filed an affidavit (in the original suit) for the purpose of procuring a writ for the arrest of Aylesworth; that the clerk issued the writ, with an order thereon specifying *some* amount for which the defendant should be required to give bail, but there is no sufficient proof of the *actual sum* (the evidence leaving it indefinite)—either \$3,000 or \$3,500, but which it is altogether uncertain, while the presumption arising from the amount of the bail bond, \$3,000, is that the order on the writ specified \$1,500 as the amount of bail required. It also appears that the sheriff, under that writ, arrested the defendant, and that he gave a bail bond, with M. O. Walker as security, in the penal sum of \$3,000, with conditions as required by law, and substantially as those in the copy of bond filed as the foundation of plaintiff's claim in this case; and that this bond was returned to the court with the writ. This bond, together with the writ and all other parts of the record,—affidavit, declaration, etc.,—were destroyed in the great fire in this city on the 8th and 9th of October, 1871.

The original records of this suit of *Smith v. Aylesworth* being thus destroyed, the plaintiff filed a petition in June, 1873, under what is commonly known as the "Burnt Rec-

ords Act," to have them restored; or rather, in the language of the petition, he presented a "*draught* affidavit and declaration substantially the same in matter and form as the originals on file in said cause, and which were destroyed as aforesaid," and prayed "for an order declaring the said *draught* affidavit and declaration be a substitute for the said original record, so far as the same may extend in supplying the defect caused by the destruction of the same."

The act under which he filed this petition required the party interested (plaintiff) to make a written application to the court, verified by affidavit showing the destruction thereof and the substance of the record so destroyed, and that such destruction of such record, unless supplied, would result in damage to the party, and thereupon the court should order such application to be entered of record and *due notice* of said application to be given that it would be heard by the court. And upon hearing, said court should make an order reciting what was the substance and effect of said destroyed record; which order was to be entered of record, and have the same effect which said original record would have if the record had not been destroyed, *so far as concerns the party making the application and the person who had been notified as provided for in the act*. Upon this application the court made an order in substance, "that the case be and it is hereby restored."

There was no order entered of record reciting what was the *substance and effect* of said destroyed record, but the substituted declaration and affidavit were filed, and thereby, it is claimed, were made records. But copies of the original writ, the order thereon fixing amount of bail required, the return on the writ and the bail bond, were not filed, and no order made reciting the substance and effect thereof.

If it was necessary to have the destroyed records restored in order to charge the parties, then there is a fatal omission in not restoring the bond, writ, order fixing amount of bail and the sheriff's return on said writ. And, even if this had been restored, still as to Walker they would not have the same effect as the originals would, because he was not noti-

fied of the application or hearing as required by the statute, in order to charge him, or that they should have that effect. He was no party to the suit, and it is true that it was not necessary to restore the suit and the records thereof, that he should have notice; that is, it could proceed to trial and judgment as it did, and be effectual as against Aylesworth, who had notice of the application, and who in fact appeared and defended it. But if Walker was to be charged on the bond and held as bail, he should have been served with, and was entitled to, notice of the proceeding before his interests could be affected. If notified, he could have appeared—could have had a day in court—to see that the copy of the bond was a correct copy of the one he executed and that the bond was such as was required by the statute, and if not, to have the bond quashed or himself released therefrom by reason of its invalidity.

But suppose it was not necessary to restore the bond, writ, order fixing amount of bail and return of the sheriff on the writ, and that Walker or his administrator could be sued upon it as a lost or destroyed bond, as in the loss or destruction of any record, bond or note (as I am inclined to think), still the question remains, has a case been made out to charge his estate?

As to the execution of a bond, substantially such as is sued on, and that it was taken as bail on the arrest of Aylesworth I have no doubt. But was it a valid bond? Was it taken for the amount required by the order of the clerk, indorsed on the writ? There is no proof that it was; the precise amount of bail required not having been shown. This is necessary to show the validity of the bond. It devolved on the plaintiff, not only to prove the execution of a bond and its contents (the original being lost), but the prerequisites, according to the allegations of his affidavit of claim filed in this case.

The claim having been objected to, the affidavit stands in the place of a declaration in an ordinary suit, and the claimant is required to prove all its material allegations.

In the affidavit, the claimant has averred that Smith brought suit against Aylesworth, filed his affidavit for a *ca-pias ad respondendum*, that *the court* (should have been, that the *clerk*) ordered that the defendant be held to bail in the sum of \$3,000; that the writ was issued, bail was given in the sum of \$3,000, and that the writ was returned, etc. Those were material allegations, necessary to show the liability of Walker's estate, and as such the claimant is required to prove them. He has failed in this, that he did not show the amount of bail required, nor the return of the officer on the writ.

But it is insisted by claimant's attorneys that it was sufficient to prove the bond—its execution and conditions; that it was given to release Aylesworth; that it was returned to court; that judgment was rendered; that a *ca. sa* was issued and returned that the defendant was not found. If Walker was alive and this was an ordinary action of debt on the bond, with such averments as are contained in the affidavit of claim, and he had put in issue, by pleas, those averments, then such proof, alone, would not have been sufficient to authorize a finding in the plaintiff's favor. But here he is dead, and this proceeding is by claim filed against his estate, and all defenses may be interposed without technical pleading. The claim is objected to, and it becomes necessary for the claimant to make all the proof that would be required on pleas of *nul tiel record*, *non est factum*, or that the bond was void because it was not taken for the amount indorsed on the writ.

In *Stafford v. Low*, 20 Ill. 152, in an action on a bail bond, the defendant plead that the affidavit in the original suit upon which the writ was issued, and upon which the defendant was held to bail, did not comply with the statute, and was insufficient in law, in not stating facts, etc., and that the arrest under the writ was illegal, and the bail bond was therefore void. The supreme court held the plea to be good. The requirements of the statute had not been complied with, and the bond was void. So here, there is no proof of the

exact amount of the bail required by order of the clerk indorsed on the writ of *capias ad respondendum*, nor of the precise return of the sheriff.

We are asked to presume that the officer did what the law required; that he made a return of the arrest, the giving of bail, and that the bail bond was filed with his writ so returned; but it is dangerous to render judgments on mere presumptions of compliance with official duty. And if such presumptions are allowed with such serious effect, then we must presume, also, that as the bond was for \$3,000, the order on the writ requiring bail was in the sum of \$1,500; for the statute required the sheriff to take bond with a penalty *double* the amount of bail required, and he in fact took it for \$3,000. Then there is a variance between the proof on presumptions and the allegation in the affidavit, that the amount required by the clerk by his order on the writ was \$3,000. But in view of the evidence of Mr. Rockwell, the presumption that the sheriff took the bond required by law cannot arise, because his testimony (and there is no other in the case upon that point)-is, that by the order of the clerk the amount of bail required was either \$3,000 or \$3,500; then of course, under the statute, the sheriff should have required bail in double the amount, and the penalty of the bond would have been either \$6,000 or \$7,000. So in any point of view the bond required by the statute was not taken; or, to say the least of it, it is not shown by the evidence that it was according to the requirement of the law, or the order of the clerk. If not the bond required, then it was and is illegal and void.

So far from the evidence showing that the bond was in accordance with the requirements of the statute, I am satisfied it shows affirmatively that it was not.

I must therefore disallow the claim, and sustain the order of the county court, from which this appeal was taken. Order sustained.

(*Supreme Court of Illinois.*)

Lucinda G. Bent

vs.

Mary Coleman, et al.

(January Term, 1878.)

DISMISSAL OF APPEAL FOR INSUFFICIENCY OF BOND. Cross motion to amend insufficient bond.

SHELDON, J.:—

There is a motion to dismiss the appeal for want of a sufficient appeal bond and a cross motion for leave to file an amendment. The cross motion is allowed and five days given within which to file the amendment.

(*Supreme Court of Illinois.*)

Lyman Chapin

vs.

Julia H. Billings.

(January Term, 1878.)

APPEAL BOND. Motion to file a new bond in forcible detainer suit to cover accruing rents and profits.

William H. Barnes, Isaac J. Ketchum and Charles A. Barnes, for appellant.

Brown, Kirby & Russell, for appellee.

SHELDON, J.:—

There is a motion to file a further appeal bond in the case. Objections are taken to the bond filed. It is a case of forcible detainer, and the objection is that the bond filed does not cover accruing rents and profits, but is conditioned merely for payment of the judgment and costs, the judgment being merely for the restitution of the land, the condition really covers costs. We think the bond should also cover the accruing rents and profits, although the order of the court below does not require that; still we think it should require it. We think the penalty is sufficient, \$2,500, and we therefore rule

to file a sufficient appeal bond within twenty days, conditioned to cover rents and profits, and if not done within that time the appeal will be dismissed.

SCHOFIELD, J.: The order is entered requiring the bond to be entered within thirty days of this date—to be approved by the clerk of this court, and in default of such bond being filed the appeal will be dismissed.

NOTE. See 91 Ill. 534.—Ed.

(Circuit Court of Cook County.)

Anna Wescott

vs.

John Menhard, et al.

(Opinion delivered May 20, 1878.)

1. JUSTICE OF THE PEACE—JURISDICTION. A justice court is one of limited and inferior jurisdiction. Its acts are null and void where it assumes jurisdiction not given by statute. Such jurisdiction must affirmatively appear.
2. SAME—JURISDICTION IN ACTION OF TRESPASS. Where the entry on the justice's docket showed a judgment in favor of plaintiff in an action "to recover damages for trespass" it was held that this was insufficient as the entry did not indicate whether the trespass was against the person or against property.

MCALLISTER, J., delivered the opinion of the court:—

Anna Wescott recovered a judgment before George L. Ford, Esq., a justice of the peace, January 25, 1878, against John Menhard and Agnes Menhard, his wife, for \$150 damages. The defendants filed a petition in this court for a common-law *certiorari*, which was allowed by my brother Rogers, and to which return has been made. The question for decision is whether it appears from the transcript of the justice, which alone can be considered, that the subject-matter of the suit was within the jurisdiction of the justice.

The entries on the justice's docket are that the "action is brought to recover damages for trespass by above named defendants."

The court decided that the plaintiff, according to the evidence offered, was entitled to the possession of the premises until January 21, 1878. Judgment was entered against the defendants for the sum of \$150 damages in trespass, and costs of suit, and in favor of plaintiff.

A justice's court is one of limited and inferior jurisdiction; the statute is the charter of its authority. Its acts are null and void when it assumes jurisdiction not given by the statute. *Robinson v. Harlan*, 1 Scam. 237. The law is well settled that in order to justify courts not of record, in taking cognizance of a cause, their jurisdiction must affirmatively appear. *Trader v. McKee*, 1 Scam. 558. Authorities might be multiplied to any extent in further support of the above propositions. Sec. 122 of the Justice's Act, Rev. Stat. 655, declares that, "It shall be the duty of every justice, whenever a suit shall be commenced before him, to record in a well-bound book kept for that purpose, the names of the parties, the amount, and nature of the debt sued for," etc.

Sec. 13, Rev. Stat. 639, defines the jurisdiction of justices of the peace, and gives jurisdiction "in actions for damages for injury to real property, or for taking, detaining, or injuring personal property."

But such courts have no jurisdiction of actions for injury to the person or to the relative rights of persons.

Trespass is an action brought for injury to the person as well as to property. If the entry of the justice had been: Trespass for injury to real property or to personal property, or even trespass to property, then it would have shown a case within the justice's jurisdiction, and the law would indulge the presumption that the evidence proved or sustained the cause of action specified. As was held in *Chicago & Rock Island Railway Company v. Fell*, 22 Ill. 336, which was a common-law *certiorari* to justice's court: "It was only necessary that the court should see that the law conferred jurisdiction upon the justice to take cognizance of the offense specified; and when it appears that the court could have had jurisdiction, the presumption is that the evidence made out a proper cause for its exercise." In that case, "the offense specified"

on the justice's docket was "trespass on personal property." In the case in hand it is simply trespass, with nothing to affirmatively show that it was trespass to property and not to the person, over which the justice has no jurisdiction. The finding of the justice as to plaintiff being entitled to the possession of premises, standing by itself as it does, would be just as material to a case of trespass to the person for forcibly putting her out of, as to an action for damages for injury to real property. I have endeavored to spell out jurisdiction and uphold the judgment; but under the rules of law applicable to courts of inferior and limited jurisdiction requiring that their jurisdiction shall in all cases affirmatively appear, I have, after repeated efforts to dispose of the case the other way, been, at last, forced to decide that it does not affirmatively appear upon the face of the transcript that the justice had jurisdiction of the cause. This court will not, in the absence of any entry on the justice's docket showing the nature of the cause of action sued on, presume that it was one within the jurisdiction of the court, because being a court of inferior and limited jurisdiction, its jurisdiction must affirmatively appear. The generic word "trespass" does not give the nature of the cause of action any more than the word "tort" or "wrong" would. It should have said "trespass to property," or something equivalent. For these reasons the judgment of the justice must be quashed. Judgment quashed.

(Circuit Court of the United States. Northern District of Illinois.)

Charles S. Crane and Jefferson Hodgkins, Petitioners,

vs.

Albert Conro, Willard S. Carlin, Harry Fox and Bradford Hancock, Assignee, Respondents.

1. **BANKRUPTCY—JURISDICTION OF CIRCUIT COURT TO REVIEW ORDER OF DISTRICT COURT.** Under sec. 4986 of the Rev. Stat. U. S., the circuit court has jurisdiction to review all cases and questions arising under the bankruptcy law where the law has not otherwise provided for an appeal.

2. **SAME—SETTING ASIDE SALE AFTER CONFIRMATION—NOTICE TO PURCHASER.** It is error to set aside an order confirming an assignee's sale upon the *ex parte* application of the assignee without giving the purchaser notice and hearing.
3. **ASSIGNEE'S SALE—WHEN PURCHASE MONEY IS PAYABLE.** After the sale of the property of a bankrupt the purchaser is not bound to pay the purchase money *instantly*. The purchaser is entitled to ascertain how and to what extent the property could be delivered to him, and whether or not the order of the court could be complied with before he can be required to pay the purchase money.
4. **PURCHASER—REAL BIDDER BOUND.** Where a bid is made at an assignee's sale by an irresponsible bidder on behalf of his principal, the principal will be considered as the real party in interest and will be bound by the bid.
5. **ASSIGNEE IN BANKRUPTCY—DUTY TO NOTIFY PURCHASER BEFORE CANCELLING BID.** An assignee in bankruptcy who cancels a bid made at an assignee's sale and resells the property without notifying the first purchaser, does not act in good faith.
6. **REVERSAL OF DECREE—EFFECT ON SALE.** Where a decree under which a judicial sale has taken place is reversed on appeal the validity of the sale is not impaired. But where the validity of the sale is the subject of controversy a different rule applies.

Cooper, Garnett & Packard and *Crane & Tatham*, attorneys for petitioners. *Henry Crawford*, of counsel.

Tuley, Stiles & Lewis and *Ayer & Kales*, attorneys for Conro & Carlin and Henry Fox.

Tenneys, Flower & Abercrombie, attorneys for Bradford Hancock.

DRUMMOND, J., delivered the opinion of the court:—

The consequences of delay in the decision of this case are so serious that I have come to the conclusion that I would dispose of the petition in review at the earliest practicable moment.

It is objected that it is improperly brought into the circuit court, under the second section of the original bankrupt law (sec. 4986, Rev. Stat. U. S.), which provides for a review of any decision of the district court, and which declares: "The circuit court for each district shall have a general su-

perintendence and jurisdiction of all cases and questions arising in the district court for such district when sitting as a court of bankruptcy, whether the powers and jurisdiction of a circuit court have been conferred on such district court or not, and except when special provision is otherwise made, may, upon bill, petition or other proper process, of any party aggrieved, hear and determine the case as in a court of equity.”¹

This law provides for the superintendence and jurisdiction of the circuit court over all cases and questions arising under the act; and unless special provision is otherwise made, it declares how the court shall exercise this supervision and jurisdiction. Therefore, unless the law has provided elsewhere for an appeal from the decision of the district court in this case, it must necessarily come up under the second section of the bankrupt law. Rev. Stat. sec. 4986.

It is not necessary that I should go into a history of the case; that has been done by the district judge. It is only of importance that I should state the fact that Fox & Howard, having become bankrupts, and a provisional assignee having been appointed, on his application to the district court he was directed to receive bids for the property of the bankrupts; and he accordingly received a bid from J. Hodgkins, on the 2d day of July, 1875, for certain property of the bankrupts, for which Hodgkins agreed to pay the sum of \$40,000. An order *nisi* was thereupon entered by the district court requiring all parties to show cause why that bid should not be received, and on the 9th of July following the same was confirmed to Mr. Hodgkins. On the 12th of July following, on application of the assignee to the district court, this order of confirmation was set aside and another bid was received and confirmed to other parties on an advance in the price, \$40,500, and the sale was confirmed to them and the money paid, and the property turned over to the new purchasers.

It is these sales and confirmations made by the district court that are the subject of controversy here. And the point is,

¹ See U. S. Rev. Stat. 1874, p. 971.—Ed.

whether or not there is provision otherwise made than in the section already referred to, for the appellate jurisdiction of the circuit court over this action of the district court. I think there is not.

This is simply a sale of the property of the bankrupts; and the question is, whether the sale shall stand as the act of the court, and the property of the bankrupts pass to the purchaser. It is not such a decree or judgment as is provided for in the eighth section of the original bankrupt law (Rev. Stat. sec. 4980), which gives an appeal or writ of error; and unless there is an appeal or writ of error given elsewhere than is provided in the third section, then it necessarily follows that the circuit court must exercise superintendence and jurisdiction over the case under that section.

It is apparent that the question whether or not a sale of the estate of a bankrupt shall stand, is one of the greatest importance. Upon it may depend not only the rights of the bankrupts, but the rights of all the creditors. And it is manifest that the statute intends to give the circuit court superintendence and jurisdiction over such cases. It would be a serious matter to hold that the order of the district court as to the validity of a sale of the property of a bankrupt is necessarily final, and that because the district court has confirmed the sale and turned over the property to the purchaser, and received the money, therefore there is no power in the circuit court to interfere with it. That would be a very simple way of depriving the circuit court of jurisdiction over a case, and it might well happen that property might be sacrificed and the rights of creditors jeopardized by the action of the district court.

It is manifest, I think, therefore, that it was the intention of the bankrupt law to allow the circuit court to have jurisdiction over all cases of this kind; and, inasmuch as an appeal or a writ of error is not elsewhere given, the right of supervision and jurisdiction must exist under the second section of the bankrupt law.

It is said that in this case there has been no record, or, at least, no full record brought into the circuit court, and that

the court has not considered the full record upon which the district court acted. That is true; but it is nothing more than fair to state the circumstances under which the record is brought before this court. A printed abstract of the testimony has been introduced, all of which the court has read. The court has not read all the original testimony, of which this is a full abstract; but the case has been submitted to the court upon this abstract, and was argued, in part, upon the abstract; and it was not until after the case was partially heard, that objection was taken by some of the counsel to the fact that this was not a full record; but, as I understand, it was submitted to the court upon this abstract for convenience, and to save labor and trouble to the court, with the understanding on both sides that, if there was any error or mistake in the abstract, it might be corrected by reference to the original depositions or testimony in the case. I so understand it. And if there is any material error in this record or abstract as it has been presented, of course I desire it to be rectified; and I wish to state to counsel upon both sides that this is the only testimony which this court has considered. But I ought to add, no material error has been pointed out.

That being so, the question is: whether the order of the district court, made on the 9th of July, 1875, confirming the sale to Mr. Hodgkins, and that made on the 12th of July, rescinding the order of confirmation and confirming a sale to other parties, should stand—one or both? When the order was made by the district court rescinding the sale to Mr. Hodgkins and confirming it to other parties, that action of the district court was brought for review before this court, and this court remitted the case to the district court with directions to open that order for the purpose of allowing Mr. Hodgkins or Mr. Crane, for whom it was claimed Mr. Hodgkins made the bid, to be heard, because the confirmation of the sale being made by the district court to Mr. Hodgkins, he became a party in court, and before any order affecting his rights could be properly made by the district court he was entitled to his day in court, to notice, and to be heard. The order of confirmation was set aside without any notice to him

whatever, and without giving him an opportunity to be heard, upon the *ex parte* application of the assignee. This court decided that to be error, and remitted the case to the district court, in order that Mr. Hodgkins and Mr. Crane might be heard upon their right to this property. They were accordingly heard, and the court affirmed its order of the 12th of July, rescinding the order of sale made to Mr. Hodgkins. The material question is, whether that order was right, and should be affirmed by this court. I think it should not, but that it must be reversed. And I will proceed to state the reasons why I so think.

The whole action of the assignee, Mr. Hancock, was under a misapprehension of the rights of the purchaser (the bidder) at the sale, which seems to have been shared by the district court. He seems to have proceeded upon this hypothesis: That, as soon as the sale was made by the assignee and confirmed, it was the duty of the purchaser at once to pay to the assignee the \$40,000 without any demurrer and upon a moment's notice. That was a mistake—a misapprehension of the law.

What was the position of the case as it stood after the bid was received by the assignee and confirmed by the court? This is the order: "It is by the court ordered that the sale of the property to J. Hodgkins, for the sum of \$40,000, mentioned in his bid therefor, and the said report of the said provisional assignee thereupon, be and the same are hereby, in all respects, approved, ratified and confirmed; and the said provisional assignee, upon the receipt by him of the sum of \$40,000, is hereby authorized and directed to execute and deliver to the said J. Hodgkins all bills of sale or other transfers to pass to and vest in the said J. Hodgkins, his heirs or assigns, all the right, title or interest of said Fox & Howard in and to said property, and to deliver to the said Hodgkins the immediate possession thereof."

What was the effect of that order? It was that, upon the payment of the purchase money, certain acts should be done by the assignee. One of them was, the delivery of the property.

Now, it was the right of the purchaser to examine into the condition of the property—to ascertain where it was. He was not bound by this bid until the 9th day of July, when it was confirmed to him. He had the right to ascertain how and to what extent it could be delivered to him; whether or not the order of the court could be or was complied with, before he could be required to pay his money.

It may be said that the payment of the money and the delivery of the property, and the written transfers and bills of sale were simultaneous acts; but undoubtedly it was the right of the purchaser to look into this matter and to ascertain whether or not the order of the court would instantaneously be complied with.

Now, it is not pretended that in any of the conversations which took place between Mr. Hancock, the assignee, and Mr. Hodgkins and Mr. Crane, it was proposed that the order of the court on his part should be fully complied with. True, the assignee said that he was ready to deliver over the property; but some of the property was not only not in the district, but it was out of the state, and it might be a very serious question whether or not it was the duty of the assignee to deliver over the property to the purchaser here; but whether that be so or not, it was the right of the purchaser to take the opinion of the court upon that subject, and not allow the assignee to prescribe dictatorially a rule to him as to when and how he should pay the \$40,000.

Undoubtedly the court might have prescribed, in the order that a certain sum of money, as a deposit, should be paid by the purchaser to satisfy the court that it was a bid in good faith. That was not done. The court required the whole sum of money to be paid down at once, under certain circumstances. Certainly it was the right of the purchaser to have the judgment of the court on any doubtful questions involved in the order of confirmation. The confirmation was made on Friday, and the order of rescission was made on Monday. There was just one business day intervening between the day of the confirmation and the date of rescission.

Now, I am obliged to say, on this evidence, that Mr. Han-

cock, the assignee, has not acted in good faith, either with the purchaser or with the district court.

Let us see whether the facts do not bear that out. The assignee says that he did not know that Mr. Crane was interested in this bid until Saturday, the 10th of July. It is clear that he is mistaken upon that point. Numerous witnesses contradict him clearly; and there can be no doubt, in examining this testimony in a candid and impartial manner, he was, to say the least, under a misapprehension. He actually did know that Mr. Crane was interested in the bid, and that he was the responsible party, on the day that the bid was confirmed, namely, Friday, the 9th day of July. And yet he is very positive to the contrary. The assignee says, on page 271: "I say I hadn't heard Crane's name mentioned in this connection—in connection with this bid—up to and before Friday, July 9. I swear to that, as a positive, definite fact." Whether he means that he didn't hear it *until* the 10th, there perhaps might be some question. "The reason I am so positive is, that they were all strangers, and they might have mentioned the name of Crane and of Smith or of Jones, or of any other man. What I mean to be understood is, that I never heard the name of Crane mentioned in connection with this matter in any way, so as to call my attention to it, at any time, up to Saturday, July 10." It is first, "up to the evening of July 9," and then afterward, "up to Saturday, July 10."

Then, on page 245, he says: "The first I heard that Crane had anything to do with this bid was from Mr. Hodgkins, on Saturday afternoon."

It is clear, upon the other testimony in the case, that Mr. Hancock was in error in this respect. He says that he was in the habit of making memoranda, or keeping a sort of diary of his business, and especially, as I understand him, of his bankruptcy business. He generally put down, the very next day, what he had done the preceding day, but the inference is that he didn't do it always; and I think the experience of every person who undertakes to keep a diary is, that unless he keeps it regularly and promptly, or if he allows a few days

to pass by without making the entry, he is very apt to confound what was done on one day with what was done on another; and it is clear that Mr. Hancock, in this case, did confound what took place on Friday with what occurred on Saturday; at any rate, the testimony is conclusive that he was notified on Friday, the day of the confirmation of the sale, that Crane was interested in it, and that he was the responsible party from whom the money was to come.

It is true that Mr. Hancock says that he made several demands on Mr. Hodgkins for this money, Friday and Saturday, and that he did not respond to them; but, as I have said, he made them under a false impression as to his right and that of the purchaser.

And again, whether he did or not, I hold that as soon as he was apprised that Mr. Crane was the responsible party from whom the money was to be received, that he should have done nothing affecting his rights without giving him notice. He says that he did not consider Mr. Crane as being the bidder; that he had nothing to do with Mr. Crane; that the only person that he had anything to do with was Mr. Hodgkins. That was a mistake—a misapprehension on his part. As soon as he was informed that Mr. Crane was the responsible party, he, the person who was making the sale and who was acting under the direction of the court, should have acted in entire good faith toward him.

Now, did he? There is one fact indisputable, namely, that on Saturday afternoon he was notified that the money was to come from Mr. Crane, and he had an interview with him, and he was told by him that the bid was a *bona fide* bid, and that the money would be paid. He didn't ask Mr. Crane at that time for the whole of the purchase money; he only asked him then that there should be a deposit made—which was the true view to take of it.

And they separated upon the understanding that a deposit would be made Monday morning—as agreed by both. The amount was not named, and properly so, because that was a matter for the court to determine—what the amount of the

deposit should be—until the purchaser could have an opportunity of looking into the matter.

I am obliged also to differ from the district court in holding that Mr. Crane was not bound by the bid. I think he was. Mr. Hodgkins was, confessedly, an irresponsible party; he had not the means or ability to raise \$40,000. He was directed by Mr. Crane to make the bid (in whose name was not stated), and did it accordingly; but out of that personal sufficiency which we so often see, instead of putting it in in the name of his principal, as he ought to have done, he put it in in his own name; but still the principal who was behind was bound for the bid, for, though a contract under the statute of frauds must be in writing, yet the appointment of an agent who makes it may be by parol.

There is not any satisfactory testimony in this case to indicate any bad faith on the part of Mr. Crane throughout this whole business. On the contrary, as soon as he was notified by the assignee, he told him it was a *bona fide* bid, and that the money should be forthcoming Monday morning; and the whole conduct of Mr. Crane is consistent with this view. The negotiations which took place between him and other parties, by which they were to have an interest in the property purchased, proceeded upon the assumption that he was the responsible bidder, and that if his bid were accepted (as it had not then been when these negotiations occurred), he was to let the other parties have an interest—and Hodgkins among the rest.

Now, what was the conduct of Mr. Hancock? He was told by Mr. Crane that the money should be forthcoming Monday morning, *the first thing* Monday morning, as Mr. Hancock says, though that is denied by other testimony. But suppose that, to be so, when was it to be forthcoming? Did not the circumstances require good faith from Mr. Hancock to Mr. Crane when he was told the money was to be forthcoming the first thing Monday morning? Certainly. How was his action after that? He went directly from Mr. Crane and entered into negotiations with other parties to make a bid

for this property without waiting till Monday morning, or even Sunday morning, and said to them: "If you will put in a bid for \$40,500 I will recommend its acceptance." Early Monday morning the assignee went to the judge and asked that the order of confirmation made on the 9th be rescinded, and that another bid should be accepted. Was that acting in good faith to Mr. Crane? The assignee was supplied with abundant information, not a particle of dissent arising from any quarter, and therefore knew Saturday night that Mr. Crane was an entirely responsible party, that he was good for the bid. After all this had taken place, the assignee negotiated with another party for a different and a higher bid, without notice to Mr. Crane, and went into court Monday morning and claimed that he had asked—not Mr. Crane, but Mr. Hodgkins—repeatedly for the payment of the purchase money, and that he had declined to pay; and the court, upon his *ex parte* statement, without notice to Hodgkins, or anybody else, rescinded the other.

Then I think it is clearly shown that Mr. Hancock did not act in good faith with the court, and, for the reasons and facts that I have stated, which are uncontradicted, and which are admitted by Mr. Hancock, because he admits that he parted from Mr. Crane on Saturday night under the expectation that the deposit would be made on Monday morning. Now it could not be expected a man would have the necessary amount by him. It is to be presumed, and I think we may take notice of the fact, that it was necessary for Mr. Crane to go to some bank on Monday morning and obtain this sum.

Before Mr. Crane had an opportunity of obtaining any considerable sum and tendering it to Mr. Hancock or to the court Monday morning, the application had been made by Mr. Hancock. He made application to the court, it seems, early; the court, at the moment, declined to make the order. Afterward, on a subsequent application, the court made the order, but still, all without notice to the purchaser.

At ten minutes after eleven o'clock on Monday morning Mr. Crane appeared before the assignee with two certificates of deposit of \$10,000 each, which are conceded to have been good

for the amount, and tendered them to Mr. Hancock in compliance with the agreement made between them on Saturday night, and Mr. Hancock said, "It is too late; I have sold the property to some one else, and the sale has been confirmed." This, all without any notice, or without any hint so far as appears, to Mr. Crane.

Now, was this acting in good faith? Was this properly discharging the duties of an assignee? Although this was a sale made by the court, it was—to speak more correctly—made by the assignee, under the direction of the court.

The assignee was the party who advertised and received the bids; he was the agent of the court. Of course he could do nothing without the consent and the ratification of the court, and as the agent of the court, and, therefore, intimately connected with the action of the court. Naturally, the purchaser had some right to rely on the declarations of the assignee, and to expect good faith from him.

Now, it is most clear, I think, that if the court had been notified on the morning of Monday, the 12th, that Mr. Crane was the responsible bidder, and that he had said Saturday night that he would bring a deposit upon the bid Monday morning, the court would not have made the order that it did. I still think that when the attention of the court was called to it immediately, as it was, and the court was informed of what had taken place, and of the understanding, it was the duty of the court to arrest all proceedings. The property had not then been delivered over. Whether the money had been paid or not, I do not know, but, at any rate, the money paid by the purchaser was in the control of the court, and I think it was the duty of the court, at that moment, to give Mr. Crane a hearing, in order that equity might be meted out to these parties, and that no unfair dealings should be practiced between them, especially by the assignee, an officer of the court.

It is for these reasons that the order which was made by the district court on the 12th of July must be reversed, because it is apparent that Mr. Crane, who was the responsible party, had not been fairly dealt with in the purchase which

he had made, and when he brought his money, as he did, as soon as it could be expected—he came and insisted it was nothing more than a reasonable time, between the confirmation of the bid and Monday morning, to give him an opportunity to ascertain the situation of the property and to see whether it was forthcoming, and whether the order of the court made on the 9th could be complied with.

I have considered this case independent, so far, of the rights of the purchasers. It is true that Conro and Carkin made a bid subsequently at the request of the assignee, and they paid their money into court, and the property was delivered over to them.

It is claimed, because that was done this court has no power over this sale; in other words, that the parties who may be affected by this sale, and this act of the district court are obliged to go into a court of chancery and file their bill. How could they do that without admitting the validity of the sale, or without taking the confirmation to Conro and Carkin, as vested in them the title to this property? That was the objection made to the filing of a bill in chancery, which it was thought could not be done so long as there was the order of the district court standing, confirming the sale to Conro and Carkin.

But, it is claimed that because when a judgment or decree is rendered, and a sale takes place under it, and a writ of error or appeal is taken to a higher court, and the judgment or decree reversed and that does not impair the validity of the sale, the same rule applies here.

The principle is well established. Why? Because the question is not there as to the validity of the sale, but as to the validity or right of the decree or judgment. It is the decree or judgment that may be set aside, and not the sale.

In this case, the very words of the order of sale, *ipsissima verba*, are the subject of controversy; whether the sale should stand as the order of the district court. It is not a sale made under a decree of the district court, but it is the order of sale itself by the district court, in an ordinary bankruptcy proceeding, and the question is, whether this sale shall stand. I

insist in all such cases the purchaser takes the property, if delivered over to him, and he pays the money, subject to the supervisory power of the circuit court over the sale.

As I said in a former part of this opinion, it would be a very easy matter to get rid of the supervisory power of the circuit court, to confirm a sale and deliver over the property and receive the money. That, certainly, was not the intention of the act of congress, as is apparent from the fourth section of the amendment of 1874.

There is one question which I have not considered, and which I shall leave open, because it was not discussed, and I desire to give the parties an opportunity to argue it. That question is as to the effect of the confirmatory order of the court made on the 9th of July, whether or not it was competent for the court, before the money was paid, if Hodgkins or Crane was ready to pay, upon the receipt of a higher bid, to set aside the previous order and to direct the assignee to transfer the property to the purchaser; that is, perhaps, not clear. It may be that it was the right of the first purchaser, upon the payment of the money, to hold the property, because it will be observed that this was not a case of the whole proceeding being *in fieri*, when the power of the court over the matter was plenary when bids were being received, but it was after a confirmation was made of the sale. I do not wish to foreclose the parties in relation to that question.

It is claimed that the bid which was made by Conro and Carkin was a higher bid and better for the estate, but if the court was inclined to receive a higher bid, and had a right to do so before the money was actually paid, and could do away with the confirmatory order of July 9, it was its duty to give that purchaser to whom the sale had been confirmed equal rights with the subsequent purchaser, because that was giving the subsequent purchaser an unfair advantage; it was saying to him after the order confirming the sale—"If you will come in and bid a higher price, the sale shall be made to you, without giving the other party the same opportunity of making a higher bid."

If the court allowed an increased bid, it ought to have per-

mitted it to come as well from the party to whom the sale had been confirmed as from a stranger.

That also is a question I do not now decide. It was not discussed, and if the parties desire it I will leave that open; that is, whether this court shall direct the property to be re-sold, taking the bid of Mr. Crane at \$40,000, or whether, upon the payment of the money, the court shall direct the sale to be directly confirmed to him. All that I now do, is to reverse the order of the district court made on the 12th of July, with costs.

(Circuit Court of Cook County. In Chancery.)

King

vs.

Interior Building Co., et al.

1. CORPORATIONS—WINDING UP PROCEEDINGS—WHO MAY INSTITUTE.

A simple contract creditor may maintain a bill to wind up a corporation under sec. 25 of the general incorporation act.

2. SAME—RIGHT OF SIMPLE CONTRACT CREDITOR TO ATTACK FRAUDULENT JUDGMENT OR FRAUDULENT DISPOSITION OF ASSETS OF CORPORATION. There is no good reason why a simple contract creditor may not prosecute a suit in equity under sec. 25 to attack a fraudulent judgment or fraudulent disposition of assets of a corporation.

3. SAME—RIGHT OF SIMPLE CONTRACT CREDITORS TO FILE SUPPLEMENTAL BILL TO SHOW THAT THEY HAVE PUT THEIR CLAIMS IN JUDGMENT SINCE FILING BILL. Where a simple contract creditor of a corporation files a bill to attack a fraudulent disposition of the corporate assets and judgment creditors intervene in such suit, the court will permit the filing of a supplemental bill to show that original complainants have reduced their claims to judgment.

4. SAME—EFFECT OF WINDING UP PROCEEDING. A creditors' bill for the dissolution of a corporation must be filed on behalf of all creditors, whether judgment or contract creditors. If fraudulent preferences are set aside in such a proceeding it enures to the benefit of all creditors and the proceeds must be distributed as other assets passing direct to the receiver.

Creditors bills, cross-bill, and intervening petitions. Motion for leave to file amended and supplemental bill. Heard before Judge Murray F. Tuley. Gen. No. 142,991. The facts are stated in the opinion.

Newman, Northrup & Levinson, for complainant.

John W. Henston, for certain defendants.

Defrees, Bruce & Ritter, for the receiver.

TULEY, J.:—

Two bills were filed, each by a simple contract creditor, on behalf of all creditors of the Interior Building Company, an Illinois corporation, seeking under section 25 of the general incorporation act the appointment of a receiver, the marshaling and distribution of the assets of the insolvent company, the enforcement of stockholders' liability, and also the dissolution of the corporation and the winding up of its affairs. The bills also attacked certain fraudulent preferences and also alleged fraudulent judgments under which the property of the corporation had been seized upon execution.

The cases were consolidated, a receiver appointed and certain assets of the corporation which had been levied on upon judgment in favor of the Lincoln National Bank were turned over to the receiver to be administered. The bank filed a cross-bill seeking the satisfaction of its judgment out of the assets levied on and out of collections made by the receiver because of its alleged prior lien thereon. An amended bill was filed in July, 1896, seeking the same relief on behalf of all creditors and also attacking the same judgment and fraudulent preferences. Answers were duly filed to the amended bill and reference was had to the master upon bill and cross-bill.

Pending the taking of evidence, some eighteen creditors who had obtained judgments against the corporation filed intervening petitions adopting the allegations of the original and amended bills and were made co-complainants by order of court. A large amount of testimony has been taken before the master, and in the meantime the original complainants obtained judgment at law upon their claims. Six of the

judgment creditors issued executions which were returned *nulla bona* in 1896. The judgments and the executions have all been proven before the master.

The complainants now ask leave to file an amended and supplemental bills, setting up the obtaining of the said judgments and issuing of said executions and returns thereon, and incorporating into one amended and supplemental bill all matters contained in the intervening petitions. Objection is made by the defendants that the supplemental matter should not be allowed to be set up in favor of the original contract creditors, because it is contended that such contract creditors have no standing in a court of equity under section 25, or otherwise, to attack a judgment or preference good as against the corporation.

It is admitted to be settled law of this state that a simple contract creditor may maintain a bill to wind up the corporation under section 25, but it is insisted that he can not in such a bill attack a judgment or preference good as against the corporation. Although in several cases before our supreme court, brought under section 25, decrees have been sustained in which simple contract creditors have successfully attacked fraudulent judgment, and preferences, yet it is contended that the right of a simple contract creditor to maintain such a bill has never been directly passed upon. See *Butler Paper Co. v. Robbins*, 151 Ill. 588, and cases cited; *Atwater v. American Exchange Nat. Bank*, 152 Ill. 605; *Roseboom v. Whittaker*, 132 Ill. 81; *Alling v. Wenzel*, 133 Ill. 264; *Wolverton v. Taylor*, 157 Ill. 485. In the last case the point was first raised in the supreme court, but it was held that it came too late.

The statute, section 25, does not say by whom "suits may be brought in equity" and no good reason can be perceived why a creditor of any kind or a stockholder or other person interested in the conservation and distribution of the assets of the insolvent corporation like the defendant corporation, may not prosecute a suit in equity under section 25 on behalf of all the creditors, and attack a fraudulent judgment or fraudulent disposition of assets by an insolvent corporation,

upon the ground that being insolvent the property and assets of a corporation became a trust fund to which the bona fide creditors would equitably be entitled to have appropriated to the payment of their respective claims.

But admitting, for the sake of argument, that a simple contract creditor cannot under section 25 attack fraudulent judgments confessed or fraudulent assignments, the question in this case goes further. It is whether upon a bill filed for such purpose by a simple contract creditor, to which bill judgment creditors have subsequently become parties, and where the original complainants have subsequently put their claims into judgment, should the court permit the original complainants by supplemental bill to set up their judgments and obtain the same relief as the other complainants, who are judgment creditors? It is not contended but that the original complainants could commence a new suit to attack the fraudulent judgments and preferences. Why should they be driven to a new suit? It is admitted that they have standing in the present case as to assets not disposed of by the corporation to have the same marshaled and distributed and the corporation wound up and dissolved. It appears to this court that this is a plain case for the application of the rule that equity having taken jurisdiction for one purpose will retain it for all other purposes necessary to the final settlement of all matters involved in the litigation growing out of or connected with the subject matter. Equity will never require two suits to be commenced where one will answer the purpose.

A bill filed by a creditor under section 25, for the dissolution of the corporation and winding up its affairs must be brought upon behalf of all creditors, whether judgment or simple contract creditors. If brought by a contract creditor, and a judgment creditor intervenes and becomes a co-complainant seeking, as he undoubtedly may, to set aside prior fraudulent judgments and preferences he litigates to that end on behalf of all other creditors, whether they are judgment or simple contract creditors, and if he succeeds, he obtains no preference as to assets so realized from his litigation.

The jurisdiction of equity attaches upon the filing of the winding up bill, and the assets so realized, by reason of the right of such intervening judgment creditors to attack fraudulent judgments and preferences, must be distributed as other assets which passed direct from the corporation to the receiver and must be divided pro rata among creditors except so far as any of them had priorities at the commencement of the winding up suit. This, in the opinion of the court, is the doctrine deducible from the case of *Blair v. Illinois Steel Co.*, 159 Ill. 350.

If there is any doubt upon the question as to whether in event the alleged fraudulent judgment and preferences are set aside, it will inure to the benefit of the simple contract creditors who filed the original bills, and who subsequently have obtained judgments,—such doubt can be removed by permitting them to set up their subsequently acquired judgments by way of supplement. It is difficult to see what injury to the defendants who claim under such fraudulent judgments and preferences can result from granting complainant leave to file such amended and supplemental bill. The necessity of defending their rights is the same without regard to who is to share in the proceeds of a successful attack.

It is difficult to perceive any limitations of a court of equity in a proceeding under section 25 of the general incorporation act. It is a "winding up bill" with all that the term implies and the court has the power to do all that is necessary to conserve, marshal and distribute the assets of the corporation among creditors and those who may be entitled thereto, in short to do all and every thing and adjust all questions necessary to settle all the affairs of the corporation and determine the rights of all interested in such winding up. The leave to file the amendment and supplemental bill will be granted.

(Superior Court of Cook County.)

Anonymous.

(January Term, 1878.)

1. GARNISHMENT—TIME OF TRIAL OF GARNISHMENT ISSUE.
2. SAME. Method of trying right to credits garnisheed.

Mr. MOSES: This is a garnishee proceeding upon a judgment. I have served notice that I would move to strike the plea from the files.

GARY, J.: The regular mode is for the garnishee to set up that the claim belongs to somebody else than the nominal plaintiff. If it appear that any credits in the hands of the garnishee are claimed by any other person by virtue of an assignment the court will permit such claimant to appear and maintain his right.

Mr. MOSES: In this case I would like to have the issue tried immediately under the statute.

GARY, J.: The statute says I shall do it *immediately* (Rev. Stat. 1874, 551, sec. 7), which I understand to mean as soon as I can. That is the best I can do. I can't undertake to make a special providence of myself. The legislature can't confer upon me power to do more than I do. The legislature meant that I should try the case as soon as I could. I won't pick out one class of litigated business to try it in preference to another class of litigated business. If you will try it without a jury then I will give you a hearing.

(Circuit Court of Cook County.)

Little, for use of Hartwell

vs.

Bryan Lathrop.

(1899.)

1. CONSTITUTIONAL LAW—GARNISHMENT ACT OF 1897—WHETHER LIBERAL EXEMPTION LAW. It is for the legislature to determine what constitutes a liberal exemption law.

2. GARNISHMENT—NECESSITY OF PRIOR DEMAND. No proceedings in garnishment can be instituted against a wage earner who is the head of a family, unless a demand is first made in writing for the excess over the amount exempt. This is a condition precedent to obtaining a judgment.
3. SAME—WAGES NOT DUE AT TIME OF SERVICE OF WRIT. Wages earned or coming due after the service of the writ of garnishment are not subject to the writ. It is against the policy of the law to allow a creditor to sue his debtor to the extent that he must work for the benefit of the creditor.
4. SAME—RIGHT OF EMPLOYER TO PAY EMPLOYEE IN ADVANCE TO AVOID GARNISHMENT. It is perfectly competent for an employer to pay his employee his wages in advance and such wages cannot be garnished.

Appeal by defendant from a judgment entered against him as garnishee before Justice of the Peace George H. Woods, for a debt of \$200 that one Charles Hartwell claimed was due him from A. D. Little, an employee of defendant. The evidence disclosed that defendant paid Little's monthly salary in advance and at the time the writ was served nothing was owing.

The case was submitted to the court without a jury.

Asa G. & Elmer Adams, attorneys for plaintiff.

Willard & More, attorneys for defendant.

TULEY, J. (orally):—

The first question here is as to the effect of what is known as the Case garnishment act. The law as it stood at the time that act was passed, in 1897,¹ as I understand it, was as follows: "The wages and services of a defendant being the head of a family, and residing with the same, to an amount not exceeding fifty dollars, shall be exempt from garnishment. In case the wages or services of such defendant in the hands of a garnishee shall exceed fifty dollars, judgment shall be given only for the balance above that amount" (section 111, ch. 79, Ill. Stat.). The point is made that the act of 1897 (section 14, ch. 62, Ill. Stat.¹) is unconstitutional in that it is not a liberal exemption law. I shall not pass on that fur-

¹ Laws of 1897, p. 231.—Ed.

ther than to say that my first impression would be that it was for the legislature to determine what was, and what was not a liberal exemption law; and that the intention of the legislature by the passage of this act of 1897, was to comply with the provision of the constitution requiring the passage of liberal exemption laws.

The question is, What is the true construction of that law in the case of a garnishment of the wages of a person, who is the head of a family? As to wages, the exemption law provides that the wages of a person who is the head of a family and is residing with same, to the amount of eight dollars per week shall be exempt from garnishment, all above the sum of eight dollars per week shall be liable to garnishment. If that section stood alone, without the proviso, it would be substantially the act as to exemption of wages which was in force theretofore, which exempted a lump sum of fifty dollars, and made all above that liable to garnishment, this one providing that instead of fifty dollars in one sum, there shall be eight dollars a week. Now comes the proviso, "Provided the person bringing suit shall first make a demand in writing for the excess above the amount herein exempted." That proviso makes a condition precedent to *any* garnishment of wages of a defendant who is the head of a family, having any effect. Unless that condition precedent is complied with, there can be no judgment for wages, even for the amount over and above eight dollars per week. Instead of that law being hard upon the head of a family, possibly more so than the exemption of fifty dollars, a lump sum, it is in the view I take of it, and as applied to this case more liberal to the defendant because it requires the performance of a condition precedent to the garnishing of any portion of a man's wages. In other words, if there is no demand made there can be no garnishing of wages under this act. The person bringing suit shall, first, make a demand in writing for the excess of the amount thus exempted, and unless that demand be made, that law is not complied with. It was intended to supercede the old law, so now there can be no garnishment of wages unless demand is first made for the balance over and

above eight dollars per week. There having been none in this case, there can be no garnishment of this man's wages, who is the head of a family in this city.

But even supposing the court is wrong in that matter, the broad question arises whether, under the law as it now stands, any wages coming due for services or work performed after the service of the garnishment process, can be garnisheed. The revision act concerning justices of the peace, the act of 1895, has revised all of the proceedings before justices of the peace in one act, including proceedings in garnishment, both upon attachment and execution. Section 1, art. 9, ch. 79, Rev. Stat. 1895, provides as follows: "Whenever an execution, issued on a judgment rendered by a justice of a peace shall be returned by the proper officer 'no property found,' on the affidavit of the plaintiff or other credible person filed with the justice of the peace that the defendant in the execution has no property within the knowledge of such affiant, in his possession, liable to execution, and that such affiant has just reason to believe that any other person is indebted to such defendant, or has any effects or personal estate of such defendant in his possession, custody or charge, such justice of the peace shall issue an execution against the person supposed to be indebted to or supposed to have any effects or personal estate of such defendant, commanding him to appear before some justice as garnishee, and such justice of the peace shall examine and proceed against such garnishee in the same manner as is required by law against garnishees in original attachments." Now, how was he to proceed in the original attachment? In an original attachment the summons to the garnishee was contained in the writ of attachment that was issued against the property of the debtor, and on the return of that summons the justice is required to proceed and determine the cause.

I read from section 3 (art. 9, ch. 79): "It shall not be necessary to exhibit or file interrogatories in writing, but the garnishee may be examined orally touching the personal estate, goods, chattels, moneys, choses in action, credits and effects of the defendant in execution, and the amount and

value thereof in his possession, custody or charge, and from him due and owing to such defendant at the time of the service of such summons, or of any writ of attachment." Now, what is the inquiry to be made? The amount due at the time of the service of the summons, clearly. All the garnishee is required to answer, is as to the amount due the debtor at the time of the service of the summons.

Section 4 (art. 9, ch. 79.) reads as follows: "When the plaintiff in any garnishee proceeding shall allege that any garnishee served with process, or appearing before a justice of the peace, has not truly discovered the personal effects of the defendant, and the value thereof, in his possession, custody or charge, or from him due and owing to the defendant, at or after the time of the service of the writ, or which shall or may thereafter become due, the justice of the peace shall immediately (unless the case be for good cause continued) proceed to try such cause, as against such garnishee, without the formality of pleading. The trial shall be conducted as other trials before justices of the peace, and if the finding or verdict shall be against the garnishee, judgment shall be given against him in the same manner as if the facts had been admitted by him, with all costs of such trial. If the finding shall be in favor of the garnishee, he shall recover his costs against the plaintiff. And in case the garnishee admits indebtedness to the judgment debtor, he shall not be liable for costs." Now, was the justice of the peace to give judgment upon that investigation, for anything excepting that provided for in section 3, the amount from him due and owing at the time of the service of the summons, or, is he to go on and inquire whether anything has become due since the service of the summons, and if so to give judgment therefor? The law does not say expressly that he shall give judgment for what shall be served and become owing after the service of the writ, otherwise than by implication.

The court then, in order to hold that judgment might go for after-accruing wages (by "after" I mean "after the service of the summons"), must hold that such a judgment was intended by implication from the provisions of section 4,

art. 9. It seems to me that the court would not be authorized by any language short of an express provision in saying that judgment should be rendered for any amount that might be found owing to the debtor from the garnishee at the time of the examination. In other words, the court is not going to assume that the legislature intended to garnishee a man's wages before they are earned, to give the creditor a mortgage on the debtor's labor; the court cannot make any such intendment.

What is a garnishee? It is an attachment; it is a seizure—it is a conveying into possession. Of what? You cannot take into possession what does not exist. It is a taking into possession of a debt, just as a writ of attachment takes hold of chattels, real estate or personal property. The garnishee process is a taking hold, by a writ of the existing debt, and that is all you can take hold of; you cannot take hold of what does not exist. You cannot put your hand on what does not exist. If you cannot seize by attachment what does not exist, you certainly cannot seize by garnishee process, which is nothing more than a theoretical seizure, what does not exist.

To my view, it is against the policy of the law to allow a creditor to pursue his debtor to the extent that instead of working to support himself and family, he must work for the benefit of the creditor. The only object of an exemption law is to save the debtor and his family from the exactions of his creditors, and it is against the policy of that law to say that a creditor can acquire any kind of a lien, any kind of a mortgage, legal or equitable, upon the future labor of his debtor. Whether the law is such a law as was contemplated by the constitution in requiring the legislature to pass liberal exemption laws, is a very serious question. My opinion is, that the proper construction of this act, in regard to the garnishment of wages, must be that it only applies to wages due at the time of the service of the writ upon the garnishee. It cannot apply to any other wages. It may apply to wages already earned and thereafter to be paid, but it cannot apply to unearned wages to be contracted for or to be earned in

future, and paid in the future. To permit a garnishment for money to be paid for services or work to be done in the future, would be to establish the penal system of slavery.

The decision of Judge Moran, in *C. & E. I. R. R. Co. v. Blayden*, 33 Ill. App. 254, and the decision of Judge Adams in *Davis v. Siegel, Cooper & Co.*, 80 Ill. App. 278, referred to, are both very clearly to the point. Judge Moran cites *Alexander v. Pollock*, 72 Ala. 137,¹ and other authorities which are very clear to the effect that it is perfectly competent for a contract to be made between the employer and the employee, that his wages shall be paid in advance of their being earned, and that such a contract is a valid contract, and that such wages cannot be garnisheed.

Now, in the case at bar, if there was such a contract, it is valid, but whether there was a contract or not, the garnishee testifies that he voluntarily paid the debtor's wages monthly in advance. Had he not a right to do so? The money was his own. If he chose to trust the employee to work for him and run the risk of the loss of the wages, that was his business, and if he has paid him, why should he pay it twice? He had already paid the wages for May, he paid the wages for June in advance, did it voluntarily, and had a perfect right to do it. At the time of the service of the writ, he owed nothing to this defendant. It was not then known that he ever would owe him anything. I take it, that the presumption must be that the contract of employment between Mr. Lathrop and his employees was from month to month, presumably at will, so far as is shown, and *non constat*, there may never have been a dollar earned in June, the party may have been discharged or quit of his own voluntary motion. I see nothing in the law that prohibits the making of such a contract. If the contract for wages is from month to month, or from day to day, every month is a new contract, and every day is a new contract for wages.

It may be this will hinder the creditors somewhat in the col-

¹ Cited in 78 Ala. 525; 88 Ala. 254, 7 So. 53; 111 Ala. 537, 20 So. 368; 124 Ala. 414, 26 So. 907, 82 Am. St. Rep. 183. See 24 Cent. Dig. Garnishment, sec. 55.—Ed.

lection of their debts, but the constitution says that if creditors are not merciful, the legislature will pass laws by which they will become merciful and not be able to force their claims to the injury of the debtor's family. In my opinion, the makers of the constitution never intended to give the general assembly the power to pass a law by which a man should have, in any way whatever, a mortgage upon the wages of another man to be earned in the future.

The finding on the first proposition of law from the evidence introduced in the case will be for the defendant.

The judgment will go for the defendant, and that the garnishee be discharged with his costs.

(Circuit Court of Cook County. In Chancery.)

The Atlantic and Pacific Telegraph Company

vs.

The Baltimore & Ohio Railroad Company and American Union Telegraph Company.

(March 30, 1880.)

1. **CONTRACTS—PERFORMANCE BY ONE PARTY—ESTOPPEL AS TO TERMS.** Where parties are in negotiation in reference to a joint adventure and one party notifies the other that he will proceed to expend monies and change his own status under the terms proposed to the other party and such other party stands silent and leads the first party to suppose that his terms are agreed to, such other party will be held to be equitably estopped from denying such proposed terms to be the terms of such joint adventure. Not having spoken when he should, he will not be heard to speak when he should be silent.
2. **SAME—PERFORMANCE BY ONE PARTY OF IMPERFECT CONTRACT.** If one party acts under an imperfect contract and the other party has the right to fix the terms of the contract subsequently, such party will not be allowed to fix other than "equitable terms."
3. **EQUITY PRACTICE—AMENDMENTS—LIBERALLY ALLOWED.** The objection that the proof and the allegations do not agree is well nigh obsolete in a court of equity. The statute provides that *any* amendments may be allowed in the discretion of the court.

If the proof shows that a party is entitled to relief the court will permit the amendment of the bill so as to conform to the proof.

4. **ADEQUATE REMEDY AT LAW.** Where the damages which a party will suffer are uncertain there is not an adequate remedy at law.
5. **INJUNCTION—AFFIRMATIVE RELIEF—CONTINUING INJURY.** Affirmative relief by injunction will seldom be granted, yet the court will not only restrain a party from wrongdoing but will also restrain him from continuing to do wrong, even if thereby the wronged party does obtain affirmative relief. The remedy by injunction is almost co-extensive with the remedy by specific performance.
6. **INJUNCTION—WHEN ISSUED.** The injunction writ should be issued with great caution by every chancellor, but courts of equity have never placed any defined limits to the exercise of the power.
7. **CONTRACTS—CONSTRUCTION—UNUSUAL CONTRACT.** Where the terms of a contract are in dispute and the agreement contended for by one party is extraordinary in its nature and one-sided the court will require the clearest evidence to establish the contract.
8. **SAME—DISPUTE AS TO TERMS.** Where a verbal contract for the erection of a line of telegraph along the right of way of a railroad is entered into between a railroad and a telegraph company and the railroad company claims the right to take possession of the poles upon *accounting* for their cost and it is contended by the telegraph company that possession could not be taken unless *payment* of the cost of the poles was first made, the court will construe the contract to require payment of such cost as a condition precedent to the taking possession of such poles.
9. **SAME—LEGAL RIGHTS UNDER—MUST BE EXERCISED IN GOOD FAITH.** Even though an absolute and arbitrary power exists under a contract to do a particular act the court will not permit the exercise of such power, unless it is done in good faith. Good faith is of the essence of all contracts. The court presupposes in every contract a basis of good faith upon which all the stipulations contained in the contract must rest.
10. **SAME—RIGHT OF RAILROAD COMPANY TO TAKE POSSESSION OF POLES OF TELEGRAPH COMPANY UNDER CONTRACT—GOOD FAITH.** Where under a contract a railroad company has the right to take possession of the poles and lines of the telegraph company erected along the right of way of the railroad company this right cannot be exercised in bad faith and for the benefit of a rival telegraph company.

11. **PUBLIC POLICY—COURTS NOT AFFECTED BY.** The courts cannot be influenced by the argument that it would be against public policy to grant the relief prayed for. "Public policy is an unruly horse, which, if a judge unwarily mounts, ten to one, he is run away with."
12. **EQUITY—INJUNCTION TO PREVENT DOING OF ACT WHICH DEFENDANT HAS RIGHT TO PERFORM EVEN IF INJUNCTION ISSUED.** The court will issue an injunction to restrain a defendant from terminating an agreement which it is sought to terminate in bad faith, even though such party can thereafter terminate the agreement at its pleasure.

Motion for injunction. Heard before Judge Murray F. Tuley.

TULEY, J.:—

The facts of this controversy I find to be substantially as follows: It appears that in September, or early in October, 1873, negotiations commenced between Thos. T. Eckert, then president of the Atlantic and Pacific Telegraph Company, the complainant, and John W. Garrett, president of the defendant, the Baltimore & Ohio Railroad Company, for the putting into operation a joint telegraph system for the two companies on the line of that portion of defendant's Baltimore & Ohio Railroad, known as the Central Ohio Division, and which might be extended over the entire lines of road of the Baltimore & Ohio Company, with such modifications as might be agreed upon.

A proposition was submitted by President Eckert to President Garrett, apparently in compliance with the latter's request, by which the Atlantic and Pacific Company proposed to erect a line of poles at its own cost on line of defendant's road between Wheeling and Columbus; the wires of the railroad company to be transferred to the new line of poles, and the railroad company to have the right to put on additional wires, as it desired; the Atlantic & Pacific Company to have the right to put on a through wire for its exclusive use, and the railroad company to put an additional wire for the joint use of the two companies. The telegraph company was to furnish main battery power for operating all the wires, and

to pay one-half the compensation of operators at the principal railroad stations. Other details as to the use of office room, and the division of the receipts were included in the proposition.

This proposition was made October 9, 1875, and appears to have been made after the parties had arrived at an agreement to act together, and was made for the purpose of arranging its details. In the letter containing the proposition referred to, President Eckert writes that the poles for the work are "being loaded today," and asks to be informed by telegraph whether the work could proceed; also that President Garrett have a formal contract drawn and forwarded.

On October 15, 1875, Eckert again writes Garrett, enclosing copy of contract covering the Central Ohio Division, which he states comprises the various modifications and additional points elicited during "our conference," referring evidently to some conference held between the 9th and 15th of October. Eckert refers to the fact that he finds the word "free" erased, and offers reasons why it should remain in, and states that he having executed the enclosed copy, requests Mr. Garrett to have another copy made and duly executed and forwarded to him, Eckert. On the 16th of October, 1875, Eckert informs Garrett that upon receipt of notice that poles, wires and insulators proposed to be shipped to Chicago Junction, near Chicago, the telegraph company will put them up to the office of the railroad company in Chicago, and, if necessary, place them in the telegraph company's right of way. On the same day Eckert writes Garrett that "agreeably to our conversation I have respectfully to present for your consideration the following plan for operation of the telegraph lines of the Baltimore & Ohio Railroad Company," and submits a long detailed plan of operation and statements as to how the earnings of the line are to be divided, and notifies Garrett of the amount of territory covered by the Atlantic & Pacific telegraph wires. He says: "If this arrangement is agreeable to you, as I hope it may be, this letter and yours in reply signifying that fact will form all the agreement that need be entered into between the two companies, at least for

the present. If, upon a trial of this plan, modifications should be made desirable in any feature thereof, we shall cheerfully meet you in so framing them as to render the arrangement entirely agreeable; or it may be terminable entirely at your pleasure on giving such reasonable notice as will prevent inconvenience to the public and ourselves."

On the 19th of October Eckert, by letter to Robt. Stewart, superintendent of telegraph for the Baltimore & Ohio Railroad, requests him to meet Mr. Bates at Wheeling by Thursday morning, to arrange the details of carrying on the work of construction of the new joint lines on the Central Ohio Division, and that Mr. Garrett gave him to understand that he might proceed with the work on that division, but, he, Eckert, has waited for the formal execution of contract before actually beginning work. Upon the same day he writes to Garrett that he has the poles and men ready, and requests that he inform him if he can proceed with the work.

It appears by a letter of Bates, superintendent of Atlantic & Pacific Company, to Stewart, that the connection of the Central Ohio Railroad would be completed December 15th, at which time he says "we will have wire connection with your lines at the following places: Wheeling, Newark, Columbus, Sandusky and Tiffin."

Early in 1876, certain correspondence appears between the parties relative to certain tolls and proportions of tolls at certain points, and also as to additional wires between Tiffin and Chicago to be placed by the Atlantic & Pacific Company, but subject to agreement to be made with Garrett. In October, 1876, Eckert, in a letter to Garrett, says that he is authorized by his executive committee to proceed at once to erect a wire from Washington or Baltimore to Cincinnati, on the poles along the Baltimore & Ohio Railroad, and that he will, unless he, Garrett, sends instructions to the contrary, proceed with the work "on our own account." This wire "may be considered to be subject to such of our propositions now before you as you may in future accept, or if you desire to own it subject to the general arrangement, you may have the

option of doing so at cost on one year's notice to us, and this letter will be our agreement to that effect."

November 25, 1876, Mr. Eckert again writes to Mr. Garrett that he, having permitted the Atlantic & Pacific Telegraph Company to connect with telegraph lines on his Chicago, Lake Erie, Metropolitan and Valley divisions, he, Eckert, has again renewed his request for like actions as to the Marietta & Cincinnati Railroad, March 1, 1877, Stewart writes to Eckert that there is nothing to prevent his company putting up an additional wire desired on the Central Ohio and Chicago Division and Hempfield roads, and the division between Columbus and Newark, the agreement to be made with him, Garrett, as to the terms on which these wires are to be used.

This is substantially all the written evidence that is found bearing on the question as to what was the contract between the telegraph and the railroad company. I think it clearly appears that there were repeated conversations between the presidents of the two companies in which the terms of this joint arrangement were discussed.

It is from the affidavits which disclose what occurred at these conversations and those which relate to the conduct of the parties subsequent to the making of the joint arrangement—taken together with the evidence as to the contract contained in the letters referred to—that we are to determine what was the agreement between the telegraph and the railroad company, for it is admitted by both sides, that there was an agreement of some kind—they disagree, however, as to the terms of that agreement. The complainant contends that the contract, or agreement, was in substance as set out in the letters referred to, while the railroad company replies, that the letters contain only propositions and terms made by the telegraph company and not accepted by the railroad company, and that propositions coming from one side only can not be held to constitute an agreement; in other words, that it takes two to make a bargain. It is true that no replies appear to have been made by the railroad company to these propositions and requests of the telegraph company. If the

telegraph company had received them it is to be assumed they would have been presented in evidence, if they were of a nature that indicated an assent to the terms of the agreement proposed by the telegraph company, and, on the other hand, if the railroad company did reply to these letters containing propositions upon which the telegraph company proposed to enter into this joint system of telegraph lines, and such replies indicated a dissent, it is to be assumed the railroad company would have produced copies thereof. The fact is, that the telegraph company appears to have been extremely anxious to have the terms definitely settled and a written contract executed, and the railroad company equally as anxious to leave the terms of the joint arrangement as indefinite as possible, and to avoid the execution of a written agreement. It is, I think, apparent that the latter company desired to get the telegraph company to expend its moneys in the erection of new poles, wires, etc., and making connections with defendant's wires to as large an extent as possible—to get it so far involved in the new arrangement that it could not recede without great loss,—and this without the railroad company having definitely committed itself as to the terms of the joint arrangement, either in writing or otherwise.

This course may have been perfectly justifiable in a business point of view, but it can scarcely expect to find commendation in a court of equity. It is admitted that the complainant did proceed to erect new telegraph poles on what is called the Central Ohio Division, from Wheeling over the Bellaire Bridge, and thence to Columbus, Ohio,—that the wires of the defendant railroad were transferred to the new poles, and new wires were placed thereon as proposed by complainant in letter of October 9, 1875. That complainant also, in pursuance of the negotiations before referred to, did place a wire between Tiffin, Ohio, and Chicago, and did erect poles and string wires upon what is known as the Hempfield Branch, between Washington, Pennsylvania, and Wheeling, and that all, or substantially all, of the various lines of railroad owned or operated by the Baltimore and Ohio Company,

were jointly operated by the complainant and the railroad company; the complainant erecting poles and wires upon some of the lines, and upon others placing new wires on the poles owned by the railroad company. Among the last was a wire erected from Washington or Baltimore to Cincinnati, in accordance with the proposition which is found in the letter of October 16th, 1876, a date more than one year after the commencement of the first negotiations.

Independent of the evidence found in the affidavit for the defendants filed in this cause, I apprehend that upon the principle that where parties being in negotiations for, and having agreed to go into a joint arrangement or adventure—one notifies the other that he will proceed to expend moneys, and change his own status upon the proposition as to the terms theretofore made to such other party, and such other party stands silent, and leads the first named party to suppose that his terms are agreed to, such other party will be held to be equitably estopped from denying such proposed terms to be the terms of such joint adventure or arrangement. Not having spoken when he should have spoken, he will not be heard to speak when he should be silent. So that, except so far as the affidavits on the part of the defendants show a change of the proposed terms, I remark, that upon this principle I must conclude that the terms of the arrangement were as contained in the letters—the evidence showing that the telegraph company did act and did expend large amounts of money after submitting such proposed terms.

In any event, if complainant acted, leaving Mr. Garrett the right to fix the terms subsequently, he would not be allowed to fix other than "*equitable terms*." As to the important question (as to which the defense claims the railroad company did speak out) i. e., as to the length of time this joint arrangement was to continue, it was *prima facie* the case made by the complainant, to be terminable entirely at the pleasure of the railroad company upon giving such reasonable notices as would prevent inconvenience to the public and to the telegraph company. This is the provision contained in the plan of operation and basis of agreement pro-

posed in President Eckert's letter to President Garrett of date the 16th of October, 1875, which I have before referred to as being one of the letters that demanded some sort of answer on the part of the Baltimore & Ohio Railroad Company. This letter, and one written more than one year after, to wit: Oct. 16, 1876, are the only ones which contain propositions in which the length of time the joint arrangement is to continue, is in any way referred to. The last one referred to is in reference to the erection of a wire from Baltimore to Cincinnati, in which President Eckert says he will proceed with the work, unless he, President Garrett, sends instructions to the contrary; also that "this wire may be considered subject to such of our propositions now before you, as you may in future accept, or if you desire to own it, subject to the general arrangement, you may have the option of doing so at cost on one year's notice to us, and *this letter* will be our agreement to this effect." The general arrangement referred to, I take it, must mean the general arrangement contained in the letter of the 16th of October, 1875, in which it is proposed (among other things) that receipts for telegraphing between points reached only by the Baltimore & Ohio line were to accrue entirely to that company, but where both companies had wires, the receipts were to be divided as in that letter specified; that is, the proposition was that the Baltimore & Ohio Company might appropriate the whole receipts after having paid the cost of the wire, having given one year's prior notice of their desire to do so. It appears to be a singular proposition for President Eckert to make, if he understood, at that time, that the Baltimore & Ohio Railroad Company had the right to terminate the agreement as to all the other lines at its pleasure, without notice, and without paying therefor, before taking possession.

This letter was not replied to, but the wire was erected, and I must, from the case as made by the complainant, conclude that the defendant railroad company had the right to treat it as subject to the general arrangement, which I understand from the letters, to be that the Baltimore & Ohio Railroad Company was, in the event of the termination of the joint

arrangement, to have the possession of all the property jointly used upon the payment therefor, and to have, as before stated, the right to terminate the arrangement at its pleasure, giving such reasonable notice as aforesaid. This is the case as made by the complainant.

But it is said that *this is not* the case as made by the bill, but as the *allegata* and *probata* do not agree, that complainant can have no relief. I shall dispose of this objection, by remarking that our statute of 1872 having provided that at any time before final judgment in a civil suit *any* amendments may be allowed in the discretion of the court, that this objection has well nigh become obsolete in a court of equity, certainly as to proceedings therein prior to final decree. Even independent of the statute, I know no reason, upon an application of this kind, if the complainant's case or the defendant's case as presented, or a part of each, show such a state of facts as calls for relief, and will justify the use of the writ of injunction, why this court should not permit the complainant to amend his bill so as to entitle him to the writ.

Another objection is, that the damages are not irreparable, and may be compensated in an action at law. I do not think so. The defendant has taken from the complainant the possession of wires which form part of a circuit or of various currents; wires which the complainant was obliged to use, not only for communication to points along the lines of the wires, but also to other points and cities which are connected by other wires at various points on the lines of the wires taken possession of. How much business will fail to come to the complainant by reason of the public knowledge that it no longer has the control of these wires, must be left to the imagination; and the offer of the defendants to send its messages at usual rates, as between telegraph companies, cannot be held to give us a criterion by which we can measure the damages of the complainant.

Another objection urged is that complainant is, in fact, asking affirmative relief: a restorative injunction; that the office of the writ is preventive only, and, therefore, inasmuch as the defendant has already taken complete possession, the

writ cannot, or should not, issue. It is an ungracious defense, to say the least, for the defendant to set up, even if it were one which is sustainable. While it is true that affirmative relief as such will seldom be granted, yet the court will not only restrain a party from doing wrong but will also restrain him from continuing to do wrong, even if thereby the wronged party does obtain affirmative relief. Jeremy defines an injunction to be "a writ framed according to the circumstances of the case commanding an act which a court of equity regards as essential to justice or restraining an act which it esteems contrary to equity and good conscience." The object of the writ is generally preventive and protective rather than restorative; although it is by no means confined to the former; it seeks to prevent a meditated wrong more often than to redress an injury already done.

With reference to injunctions to enforce contracts or to forbid a violation of its terms, says Snell in his *Principles of Equity*: "The jurisdiction of equity may almost be said to be co-extensive with its power to compel specific performance. Whatever duty a court of equity will compel a party to perform, it will generally, on the other hand, restrain him from violating in many cases. Therefore, it will be seen that the court in exercising its jurisdiction to restrain a party from doing an act is in effect compelling a specific performance of that act;" and that it will not suffer parties to depart from their contract at their pleasure, leaving the party with whom they have contracted to the mere chance of any damage which a jury may give.

In this case the injunction to restrain the defendants from applying the telegraph wires, etc., to other purposes than that contemplated by the joint arrangement existing between the parties, would be within the province of a court of equity, although it might operate as a decree for the specific performance of the agreement for the time being. But this injury is in the nature of a continued injury, a continued trespass—as it continues day by day to prevent the defendant from carrying on its business of telegraphing in the various circuits with which these lines are connected. As I suggested on the

hearing, if a party took possession of a small section of a railroad track which act prevented the working of the entire line, there could be no doubt of the power of this court to enjoin him from continuing to interrupt the railroad travel until the rights of the parties could be determined.

Courts of equity have never placed any defined limits to the exercise of this power, and as new species of property are being created, new rights evolved by the progress of commerce and civilization, the necessity for its use cannot be foreseen or predetermined. It is a writ that should be used with great caution by every chancellor, but there is no writ in these days,—when corporations as powerful as the government itself exist,—that can be used more beneficially, particularly in controlling such corporations, and at the same time protecting the public against injuries arising from these wars carried on upon the principle that “might makes right.”

Having disposed of these technical objections, which, with due deference to defendants’ solicitors, are in fact mere cobwebs to be brushed aside in arriving at the true equities of a case of this kind, let us consider how far the case as made by the complainant’s bill, affidavits, and the admitted acts of the parties has been overcome by the defendants.

It will be observed that neither the bill nor answer are sworn to by parties who had any personal knowledge of the negotiations which resulted in the agreement between the Atlantic & Pacific Telegraph Company and the Baltimore & Ohio Railroad Company, and their value as affidavits is much lessened by that fact. The case as made by the defendants rests substantially upon the affidavits of Garrett, president of the Baltimore & Ohio Railroad company; of Eckert, then president of the Atlantic & Pacific Telegraph company, and one Bates, who was superintendent of the Atlantic division of the Atlantic & Pacific Telegraph lines, all of whom are now in the service of the defendant corporation, the Baltimore & Ohio Railroad company. It is admitted that the negotiations and the settlement of the terms of the agreement were all done and conducted by the president of the two com-

panies. Mr. Bates says he was present at six or seven interviews between the two presidents; and in another part of his affidavit, that he was present at all the interviews—and undertakes to tell the result of the several interviews. It will be noticed that the affidavits of these three parties do not profess to give us the terms and the agreement between the two companies, except in these two particulars, to wit, as to the right of the Baltimore & Ohio Railroad Company to terminate the agreement and take possession of the property and as to the payment therefor. President Garrett testifies upon these points in substance, that there was no written agreement, that he gave a verbal license to put wires on the railroad poles on a part of the lines, and on other parts, to put up both poles and wires, and to operate the same, but with the understanding that the railroad company might at any time revoke the license, and, *if it should so elect*, take possession of the complainant's property put on its various lines of road under this arrangement or licence. That President Eckert, when the matter was first under consideration, desired to have some fixed period of notice when this should be done, but that Mr. Garrett at all times positively declined to grant such a stipulation. He, as to the final agreement as to notice and time of termination of the agreement, says: "I could not tell at what moment the changed relations between the Atlantic & Pacific and Western Union Telegraph companies, and the necessities of the Baltimore & Ohio company might require me to have full and prompt possession of the Baltimore & Ohio Road, and its connections. Therefore, in the final interview, at which the matter was arranged, which took place at my house in the city of Baltimore, between General Eckert and myself, Mr. D. H. Bates, then superintendent of telegraph of General Eckert's company, being, as I think, present, it was conceded by General Eckert, and distinctly agreed upon between us, as an essential part of the arrangement made, that I was to be at liberty any time I pleased, to revoke the license I was giving to the Atlantic & Pacific Telegraph Company, on the part of the Baltimore & Ohio Railroad Company, to use and operate tele-

graph lines along it and its connections, and at the same time to take possession, if I so pleased, of all the poles that might be erected along the line of the Baltimore & Ohio Road, its branches, divisions, and its connections by the telegraph company, *accounting for them* at their original cost."

President Eckert says: "It was a part of the arrangement between the two companies that the Baltimore & Ohio Railroad Company should be at liberty to take the poles and wires that should be constructed or used by us in maintaining the lines of telegraph wires on the Baltimore & Ohio Railroad; that the last named company should be at liberty to take the same at any time, *paying therefor* to the Atlantic & Pacific Telegraph Company the cost price thereof.

"During the negotiations under which this arrangement was made, I tried, in behalf of the company I represented, to get Mr. Garrett to agree that the Baltimore & Ohio Railroad Company should give one year's notice before taking possession of the poles and wires, under the arrangement I have spoken of as having been made with that company. Mr. Garrett expressly declined to make any such arrangement, and stated that he must be left at liberty to take these wires and poles at any such time as he might see fit, without giving notice, to which I agreed, and so the matter was left, and so remained during the time that I was president of the Atlantic & Pacific Telegraph Company, without any understanding between the two companies that any notice should be given, as required on the part of the Baltimore & Ohio Railroad Company, whenever it should desire to take possession of the poles and wires already referred to."

Mr. Bates says: "That at the various interviews during the years 1875, 1876 and 1877, the said John W. Garrett, as president of the said railroad company, in each and all of the interviews aforesaid, declined to accept or approve of any written contract between the said telegraph company and the said railroad company, and would not make, as agent, any written agreement on the subject, but simply gave his verbal consent and temporary license to the said Thomas T. Eckert, president of said telegraph company, for the construction of

various lines of telegraph between Washington, Pennsylvania, and Wheeling, West Virginia, and Columbus, Ohio; between Tiffin, Ohio, and Chicago, Illinois; between Washington, D. C., and Cincinnati, Ohio, and between Washington, D. C., and Alexandria, Virginia; said lines to be built at the cost of said telegraph company; to be at all times and at any time subject to their being taken possession of by said railroad company, when he, the said president, John W. Garrett, might so elect. The reason given by the said John W. Garrett, during and at the various interviews aforesaid, for declining to make any written or formal agreement with said telegraph company was, that he proposed and desired to protect the interests of his railroad company against the prejudicial effects of any sale, amalgamation, or other arrangements on the part of the said Atlantic & Pacific Telegraph Company, or any other company."

The affidavit of Mr. Bates might be justly criticised. It is very broad and comprehensive; indeed, too much so. Mr. Eckert's statement, and Mr. Garrett's, as to the payment for the property of the Atlantic & Pacific Telegraph Company, do not agree. Mr. Garrett says he was to have the right, at his election to take it. Mr. Garrett seems to consider the agreement as giving him the right to terminate it any time, and that he might, at "his election," "if he so pleased," take possession of all the wires and poles that might be erected along the lines of the Baltimore & Ohio Railroad Company, payment of course to be made therefor. As to taking possession and paying for the property, there was nothing obligatory on the railroad company, even if they should terminate the agreement, is what is to be understood from Mr. Garrett's affidavit.

The affidavit of Mr. Eckert is to the effect that Mr. Garrett was to be at liberty to take these wires and poles at any time he should see fit. Both affiants aver that Garrett had the right to terminate the agreement at his pleasure, but as to taking possession of complainant's property and paying therefor, Garrett's affidavit makes the doing so optional with Garrett, while Mr. Eckert's affidavit makes it obligatory to

do so on terminating the agreement. Mr. Garrett says if he so pleased he was to take possession of the wires and poles, accounting for them at their original cost, while Mr. Eckert says that Mr. Garrett was to be at liberty to take the same at any time, paying therefor to the Atlantic & Pacific Company the cost price thereof. Mr. Bates says nothing as to any payment to be made for the wires, etc.

A contract giving the right to take possession of another's property at any time Mr. Garrett pleased, *accounting* therefor at the cost price, and a contract giving the right to take possession of another's property at any time Mr. Garrett pleased, *paying* therefor the original cost are two very different contracts. In the one payment is a condition subsequent, in the other, payment, or tender of payment at least, is a condition precedent. The title passes in the one case without payment, and the debt remains, in the other the title passes by payment. If Mr. Garrett and Mr. Eckert each understood the agreement on this point, as stated in their respective affidavits, the minds of the contracting parties failed to meet on a vital point, as to the condition upon which the Baltimore & Ohio Railroad Company had the right to take possession of the property of the complainant. The most reasonable agreement, the one that would have been most reasonable under the circumstances, was that payment should precede, or at least, be co-incident with the taking of possession. The agreement contended for on the part of Mr. Garrett is one of so extraordinary a nature, to my mind, as to require the clearest evidence that a contract so one-sided was entered into between the presidents of these two corporations. I think the fact is, that payment was to be made upon taking possession, and it was to be a payment of the original cost and not a balancing or settlement of accounts. The complainant has failed to sustain the allegation as to one year's prior notice to be given of intention to terminate the agreement as to a line, or portion of a line, of the Baltimore & Ohio Railroad Company, and as to the averment as to "reasonable notice" while there is much in the case as presented to show that complainant had the right to insist on "reason-

able notice" of the intention to terminate the agreement—yet the case as now presented (whatever may be the result upon final hearing) does show that the Baltimore & Ohio Railroad Company was not bound to give any prior notice. In the view, however, that I take of this case as now presented, it is not material for the purpose of this motion whether the notice was to be a reasonable one, or whether there was to be no notice. But, assuming that the Baltimore & Ohio Company had the right reserved by the verbal agreement to at any time terminate this joint arrangement or agreement, and take possession of the lines paying therefor, yet this was a right to be exercised with the proviso which underlies every right in every contract in a court of equity—to wit, that it be exercised in good faith.

It is argued by the defendants, that these parties were able to contract; that they are presumed to have had in view all the consequences, and that it is no matter if complainant is damaged or ruined—if it was a right, this court cannot consider the consequences. This is true as a legal proposition. But a court of equity will scan, as with an eagle's eye, the circumstances attending the exercise of that legal right, to discover, if possible, whether the right has been exercised in good faith, or whether the virus of *mala fides* has destroyed the vitality of the act. This arrangement between these companies was in the nature of a copartnership, or joint adventure; the property of each was used to make money for both, and was used as joint property for the common benefit. By the joint arrangement the property of the parties became to some extent so intermingled that it was necessary on its termination that the railroad company should own all the property, and for the railroad company's own security it was necessary that this power to terminate the joint arrangement and take possession should exist. As before stated, if the power had been exercised for the purpose it was given, and in good faith, it must be sustained.

The principles laid down in the case of *Blisset v. Daniel*, 10 Hare, 483, applied to the facts upon this part of the case, are, to my mind, decisive of the question whether or not this

power has been exercised in good faith. In that case an arbitrary power was given to two-thirds of the members of the copartnership to expel any partner from the firm. It could be done without cause, without a convention of the partners, without notice, simply by signing a notice of expulsion and delivering the same to the partner, or at his place of residence. Under this power, one of the parties was served with notice of his expulsion and payment of his share tendered to him. He filed a bill to declare the notice of expulsion void, for an accounting and a dissolution of the copartnership, and distribution of the assets in the way usual to courts of chancery. The Vice-Chancellor Wood, in a remarkably able opinion after observing that this power of expulsion was the exercise of a strict legal right, and that the construction to be given to the words of the power should be of the strictest character, and that in a court of equity everything would be considered strictly against the parties exercising the power of expulsion, reviews the various clauses of the articles of copartnership, and holds that the defendants were competent to give a notice to dissolve without assigning any reason, without holding any meeting or convention of the parties, but he says (p. 522): "The power must be exercised *bona fide*, Good faith is unquestionably of the essence of all contracts. Sir Fitzroy Kelly (one of the solicitors) has said that I could not introduce any new words into this contract. The court does not do so, but the court presupposes in every contract, and if there can be a difference, more especially in every contract of partnership, a basis of good faith, upon which all the stipulations contained in the deed must rest. This power would never be allowed to be exercised by this court in a manner against what I may call the truth and honor of these articles. . . . It is quite clear that this power was never intended to be exercised by any two-thirds of the partners, merely and solely for their own exclusive benefit. If cause be shown, of course it removes all difficulty with reference to fraud, using that word according to the sense in which the court uses it; but if cause be not shown and proved, then it must be very clearly made out that the exercise of the

power has been in good faith." He then supposes certain tests to show that the liberal construction of the articles could not be enforced, although, in fact, the parties were not obliged to assign any particular cause for the act of expulsion.

It appears that there had been trouble between a Mr. Vaughan, one of the partners, and the one sought to be expelled, and that Mr. Vaughan had obtained the assent of the remaining partners to Mr. Blisset's expulsion. Upon the ground that the power was not really used for the benefit of all the two-thirds, but only for that of the one with whom the quarrel was had, he decides that in that respect the power was not exercised in good faith. He holds that the notice of dissolution is void, upon the ground that it was clandestinely obtained by one partner, and at his instance alone (without notice to Blisset); and that it, the power, was not *bona fide* exercised on the judgment of all the partners. "I am obliged," he says (p. 535), "to hold it to be so, and that in this court, whatever notions may be entertained elsewhere, is held to be, as regards that partner, a fraud upon him, and on that account to be void." He then adds (p. 536) in words that I wish might be,—as to the standard of morals there laid down—burned into the memory of all solicitors of this court, the following: "As has been well observed during the course of the argument, the view taken by this court with regard to morality of conduct amongst all parties—most especially amongst those who are bound by the ties of partnership—is one of the highest degree. The standard by which parties are tried here, either as trustees or as copartners, or in various other relations which may be suggested, is a standard, I am thankful to say so, far higher than the standard of the world; and, tried by that standard, I hold it to be impossible to sanction the removal of this gentleman under these circumstances."

Tried, then, by this statement, which is far higher than the standard of the world, was this power exercised in good faith? In the first place, the primary object of this power being reserved to the railroad company, was for its own protection. It was not to enable the railroad company to obtain

any unfair advantage over the telegraph company and obtain its property at an undervalue, or to enable it to wantonly or oppressively injure or destroy the telegraph company; nor to enable the railroad company to speculate upon the property it might acquire by terminating the agreement, but it was solely to be used for its, the railroad company's, own protection and benefit. No cause of complaint appears to exist against the telegraph company; it does not appear that it has not carried out its contract in good faith, nor does it appear that it was necessary for the protection of the railroad company that the agreement should be terminated. The same day it was terminated, an arrangement was made by the Baltimore & Ohio Company with a rival telegraph company. Was it good faith to terminate the agreement to benefit a rival in business of the telegraph company's? Was it *bona fide* exercise of this power to terminate this agreement for the joint benefit of the railroad company and the American Union Telegraph Company? Tried by the standard of morality that prevails in this court, both these questions must be answered in the negative. Would the exercise of this right in order that the railroad company might have an advantage in the settlement of accounts, be an exercise of the power in good faith? Most clearly not. The defendant railroad company does not by its answer state that it offered to pay for the property, or that it is now willing to pay for the same. The only offer it made on taking possession, or now makes, is to adjust accounts. Does good faith resort to deceit and fraud to enable it to exercise a clear, legal right, as by giving notice, on the 28th of February, that possession would be taken on March the 1st, and then taking possession clandestinely within five hours after the notice is given? This may be justifiable by a standard of good faith that exists elsewhere, but cannot be justified by the standard that exists in a court of conscience.

I do not overlook the fact that the railroad company claims to have given notice in September, and on the 14th of February last, of its intention to terminate this agreement, but the fact of such notice being given is disputed. It was a

verbal notice,—the railroad company appears to dislike written communications—and was of such character that the parties to whom it was claimed to have been given deny that the verbal communications were notices as alleged.

In conclusion, I find this power to terminate the agreement at any time the railroad company desired, did exist, but that the power has not been exercised, the attempted exercise of it being in bad faith was a nullity, and the parties stand as to their rights under the agreement, just where they stood before that attempt was made.

As to the point made, that the recent act of congress permitting railroads to do a telegraph business, is void, and therefore that the railroad company had no power to carry on a commercial telegraph system, it is sufficient to say, that if the railroad company is exercising franchises that it has no right to exercise, the representatives of the people must inquire into that by the proper proceedings.

As to the argument that it is against public policy to sustain the telegraph monopoly, counsel could scarcely have expected me to be influenced by it. This is a court of rights, not of public policy. I try to bear in mind the remark made by Mr. Justice Burrough,—“Public policy is an unruly horse, which, if a judge unwarily mounts, ten to one, he is run away with.” But, it may be asked, if the railroad company can terminate the agreement at its pleasure *cui bono*; what end will be accomplished by an injunction which will permit the old relations or connections to be restored? In *Blisset v. Daniel, supra*, I have no doubt the same argument was made, yet the vice-chancellor did not decline to take jurisdiction, but, having obtained jurisdiction, he proceeded to take an account and to dissolve the copartnership, not according to the articles, but in accordance with the practice of the court of chancery and principles of equity.

This court having obtained jurisdiction to afford the complainant relief by injunction, will control the further proceedings of the parties, not in opposition to their agreement, but having ascertained by the light which a cross-examination of the witness and a final hearing will let in upon the facts,

all the information necessary to determine the rights of the parties, it will proceed to settle them according to the practice of a court of chancery and the principles of equity that prevail in that court. The complainant is, therefore, entitled to an injunction restraining the defendant from further interfering with the complainant in the use and control of the poles, wires and property (described in the bill), in the same manner and to the same extent as it, the complainant, had, and was exercising the use and control thereof on and prior to the 28th of February last.

The complainant may make amendments, if the solicitors deem it necessary to make any amendments, and prepare an order for an injunction.

(Superior Court of Cook County. In Chancery.)

Oak Park Trust & Savings Bank

VS.

Central Life Underwriting Association, et al.

(February 3, 1903.)

1. **PAROL EVIDENCE—WRITTEN INSTRUMENTS.** While parol evidence is not admissible to contradict, change or modify a written instrument, the court may admit parol evidence to show the conditions environing the parties prior and at the time of the execution of the instrument, for the purpose of arriving at the intention of the parties.
2. **DEPOSIT OF SECURITIES—TRANSFER TO BONA FIDE HOLDERS.** Where certain securities were transferred to an insurance company in exchange for certain shares of its stock, under a contract providing that such securities were to be returned to the depositor in case the insurance company failed to comply with certain provisions of the contract, it was held that the securities were sold and not loaned, and that as against a bona fide holder the depositor had no title.
3. **CONTRACT—ILLEGAL PURPOSE—TRANSFER OF SECURITIES FOR.** Where certain securities were loaned to an insurance company under a contract, for the purpose of enabling it to deposit the same with the state, it was held that the contract was fraudulent and unlawful and the parties to it could not receive any countenance or assistance with respect thereto, from a court of equity.

Creditor's bill and cross-bill. Demurrer to cross-bill as secondly amended. Heard before Judge Jesse Holdom.

For statement of facts see opinion.

George W. Plummer and *Messrs. Stillman and Martyn*, for complainant in cross-bill.

Jesse A. Baldwin, F. W. Pringle, Thomas A. Banning and *Messrs. Paddock & Baker*, for defendants in cross-bill.

HOLDOM, J.:—

I am not going to agree with any suggestion or insinuation that may have been made, that the case has been too elaborately argued. The questions are very interesting and somewhat involved, and I have been diligently examining the briefs, and have no cause to complain of their being unduly prolix. The original bill in this cause is a creditor's bill based on two judgments against the Central Life Underwriting Association, obtained by complainant September 17th and 18th, 1902, for \$1,426.59 and \$3,358.81 respectively, executions thereunder having been returned *nulla bona*.

Hagins filed his cross-bill, claiming title to the securities now held by the defendant, the Western State Bank, to which defendants in cross-bill interposed special and general demurrers. The case is now before the court for decision on these demurrers.

The whole transaction is evidenced in writing. Nixon, as president, and Meyers, as secretary, of the Central Life Underwriting Association, joined in a written statement of its condition to Hagins, after which Hagins entered into a written contract with the Central Life Underwriting Association, under which securities amounting to \$43,000 were delivered to it. On the construction of this contract depends mainly the solution of the correctness, or not, of Hagins' contention that the securities were not sold but loaned.

By the terms of this contract the association sells certain shares, not mentioning the number, of its stock to Hagins, and in payment therefor Hagins sells, assigns and transfers unto the association the securities in question.

By the terms of the writing, the association might, at its

option, repurchase its stock, "paying therefor either with the above named securities at their par value, or with other securities acceptable to said Hagins, equal to the amount of stock so purchased at par value, or by payment of the par value of said stock in cash." Then follow provisions in relation to payment of twelve per cent of the face value of securities until expiration of one year, etc.; or repurchase of the stock by the association, the association to have the privilege of paying seven-twelfths of such twelve per cent in coupon interest notes on securities "so sold and transferred," and Hagins agrees to accept the same. If the stock is, at the end of the year, paying a dividend of twelve per cent, then Hagins can not require the association to repurchase its stock; if not earning and paying such dividend, Hagins can require the association to repurchase its stock at its par value, paying for the same with the securities, or other securities satisfactory to Hagins, or in cash. Then follows the provision, "or in case of failure to pay the interest herein stipulated monthly on demand," Hagins "shall have the right to have said securities returned." William Penn Nixon and John E. Meyers entered into a written agreement on the foot of the contract by which, as officers of the association, in consideration of Hagins signing and entering into the contract, they personally obligated themselves that the securities should be returned, in case the association failed to comply with that condition of its contract.

According to the contention of cross-complainant, it was intended that these securities should be used by the association and transferred to others—put out of its reach and control—parted with beyond recovery. They were sold and transferred by the terms of the writing, and passed by actual delivery. It was a bargain and sale—stock of the association for Hagins' \$43,000 of real estate paper. True it is that Hagins, failing to receive his twelve per cent in monthly installments during the year, had the right to a return of the securities, and that is the only condition under which he could demand their return. That right rested on the existent condition at the time of its attempted exercise, viz., that

the association had then in their possession or were then vested with the title so that they could return them. Failing this Hagins' right was unavailing. The allegations of the cross-bill affirmatively charge that the association does not own the securities; that they have been transferred to the Western State Bank.

I therefore hold that the securities, by the writing set out in the cross-bill, were sold to the association by Hagins; that as between him and the *bona fide* holders for value he has no claim or title.

The demurrers admit all the allegations of the cross-bill as amended, and for the purpose of this decision must be conceded their full purport and intendment. Grave charges of irregularities in this transaction are made, and the judgments on which the creditor's bill is founded are alleged to be collusive and fraudulent, all of which a party in interest might challenge, and invoke the aid of this court for such relief as his invested interest in the subject might warrant.

While parol evidence can not be received to contradict, change or modify a written instrument, yet under well settled legal principles the court may admit parol evidence as to the conditions environing the parties prior and at the time of executing the writing, not for the purpose of taking from, adding to, or reading anything not found there into the writing, but for the purpose of arriving at the intention of the parties at the time, enabling the court to intelligently construe the writing—in other words to place the court in the same position in which the parties were at the time, so that what operated upon their minds may likewise influence the judgment of the court, in arriving at a correct solution of that which the parties intended by the words which they used in writing. The averments of the amended cross-bill of matters resting in parol are not, for that reason, subject to the objections made by complainant.

Hagins also avers that the intention of the parties to this transaction was that the securities aggregating \$43,000 should be used to obtain other securities of quality and value acceptable to the State Insurance Department of the State of

Illinois, to receive as a deposit for and on behalf of the Marquette Life Insurance Company, to enable it to do a life insurance business in this state under the insurance laws thereof, the Marquette Life Insurance Company being controlled by certain officers of the Central Life Underwriting Association. The securities transferred by Hagins to the association consisted of mortgages on California real estate; these were, it is charged, to be exchanged for mortgages upon property in Illinois, to make them available for deposit with the insurance department, as required by the insurance law of this state. To accomplish this under the law, the mortgages so to be deposited with the insurance department of the state, must be so deposited under the representation that the same formed a part of the assets of the Marquette Life Insurance Company, and could not be received by the department under any other condition.

If the contention of Hagins in this regard be true, the Marquette Life Insurance Company would not be the owners—the securities would simply be borrowed for the purpose of an attempt to deceive the insurance department of the state; for while, when once deposited, they could not be reclaimed by Hagins, yet at any time, on their surrender by the department to the Marquette Life Insurance Company, they would belong to Hagins as representing the securities which he had loaned. By this scheme the public would be led to believe that the Marquette Life Insurance Company owned the securities so deposited, and on the faith of such being the fact, would be led to transact business with it. Thus would an apparent glaring fraud be practiced upon the public and upon the insurance department of the state. If the facts as alleged were known to the insurance department, the securities would neither be received nor the Marquette Life Insurance Company licensed to transact a life insurance business in this state.

This is a compact abhorrent to a court of conscience, and can receive no countenance or assistance from this forum. However disappointed Hagins may be at the *denouement* of this transaction, he can not obtain any relief for any losses

which he may have suffered through his unlawful enterprise. *Wright v. Cudahy*, 168 Ill. 86; *Oscanyan v. Arms Co.*, 103 U. S. 261; *Critchfield v. Bermudez*, 174 Ill. 466.

The agreement of Hagins with the Central Life Underwriting Association was a bargain and sale, by the delivery of which, with the guarantee of Nixon and Meyers, of the \$43,000 in securities, the title to the latter passed to the association, and a delivery by the association of the securities, properly assigned, upon a sufficient consideration, to the Western State Bank, vested the bank with the title thereto, superior to any claim of Hagins disclosed by his amended cross-bill.

The purpose and intention of the parties to the written agreement declared to exist by a verbal understanding between them, is repugnant to the principles of equity, and against public policy.

The demurrers to the cross-bill as secondly amended are well taken, and will be and are sustained, and the said cross-bill, as secondly amended, is hereby dismissed for want of equity, at the cost of cross-complainant.

(Circuit Court of Peoria County. In Chancery.)

Ephraim Marshall, et al.

vs.

Thomas McClellan, et al.

(February, 1870.)

1. **TAXES—INJUNCTION TO STAY COLLECTION OF.** An injunction to stay the collection of taxes should not be allowed except in extreme cases, where the grounds are clear.
2. **INJUNCTION—POWER OF JUDGE TO ISSUE IN TERM TIME.** An injunction awarded by a judge during term time is a nullity as his right to so act exists only in the vacation period. The authority to issue injunctions during term time rests in the circuit court and not in the individual judges.

Motion to vacate order for injunction. Heard before Puterbaugh, J. The facts are stated in the opinion.

PUTERBAUGH, J.:—

The bill in this case was filed in the circuit court of Peoria county on the — day of February, instant, and was regularly docketed as of the present term. The complainants then interposed a motion on the motion docket, under the rules of the court, for an injunction. While this motion was pending, the bill was taken from the files of the court, and, in clear violation of the standing rules, carried to another circuit, and an injunction obtained, not from any court, but from a judge in his official capacity.

When the motion was called, the court declined to issue a temporary injunction, but expressed a willingness to award a provisional writ until the coming in of the answer, and the merits of the motion could be fully heard. The counsel for the respective parties then stipulated in open court that a provisional injunction should be waived, and that the defendants would forbear doing any of the acts complained of, until the motion could be determined.

An injunction to stay the collection of taxes should not be allowed, except in extreme cases. The revenues are indispensable to the existence of the government, and to stop their collection must necessarily lead to great public embarrassments, and hence a court should not grant the writ except upon a full investigation, and where the grounds are clear.

The only question to be considered upon this motion is, whether the judge granting the writ had the power to do so. If he had, then the order must stand until the injunction is sustained or dissolved upon the hearing of the case. If the act of the circuit judge is unauthorized by law, then that act can have no more effect upon the rights of the parties in this case, than the act of any unauthorized person.

The statute conferring the power upon judges to issue injunctions is as follows:

“The Supreme and Circuit Courts in *term time*, and any judge thereof in *vacation*, shall have power to grant writs of *ne exeat* and injunction.”

While the power given is broad and comprehensive, and injunctions when thus granted may operate throughout the

state, the times when they may be awarded are specifically stated.

The order of the judge of the 21st judicial circuit in granting this writ is made by him in his capacity as judge. It does not appear to have emanated from any circuit court in term time. It is simply an order directing the clerk of this court to issue the writ, notwithstanding the judge presiding over this court is present and in the discharge of his duty. It will be seen from the statute that applications for injunctions must be made to the "Circuit Court during term time." No authority is conferred upon a *judge* to grant the writ during the "term time." He can only act during "*vacation*." The circuit court of Peoria county at the time this injunction was awarded, was in session, consequently the application must have been made and determined in that court.

The order, therefore, directing the injunction to issue, is wholly without authority of law, and is absolutely null and void, and will therefore be set aside, and for naught held and esteemed.

It would be a monstrous doctrine to hold, that after a court has acted upon questions pending before it, during the session of the court, that any circuit judge can step in and interfere and reverse the orders of the presiding judge, while sitting as a court. During "term time" no judge of another circuit has any power to interfere in any manner with the proceedings in the court in session.

To sustain such an unwarrantable assumption of power, would be to destroy public confidence in the stability of our judicial tribunals, and bring them into contempt.

In the case of *Welch v. The People*, 38 Ill. 20, the supreme court held that when one circuit judge, to whom application had been made in vacation for an injunction had refused the writ, it was merely a question of courtesy, whether another judge to whom a second application may be made, will look into the case and allow the writ. In that case the suit upon which the applications were made was not yet pending, nor was the court in the county where the writ was to be issued and made returnable in session.

If there was a *vacation* of the circuit court of Peoria

county, no one would doubt the power of any circuit judge in the state, to award injunctions, etc., affecting the rights of the people of the county. But in this case no such "vacation" existed. And although the power is acknowledged, even when the judge of that court is present, yet the courtesy and propriety of such action would be open to comment, and no doubt strongly questioned.

The rule adopted in this circuit in relation to granting injunctions in cases outside of the circuit, is that it must be shown by affidavit that the local judge is absent, or from other cause application cannot be made to him, in time to protect the rights of the party complaining, before the judge of this court will interfere.

And while it is within the discretion and power of every circuit judge to adopt such rules upon this subject as to him seems expedient, yet it would greatly promote the courtesy existing between the judges if the practice in relation to granting injunctions in such cases, was more uniform throughout the state.

Such interference in judicial proceedings must be humiliating, and are well calculated to lessen the confidence of the people in the standard of our judiciary. It is gratifying to know that, in the whole history of our state jurisprudence, no parallel case can be found.

I am well satisfied that the judge of the 21st judicial circuit acted in this matter from a misapprehension of the facts. I know from many years personal acquaintance with that gentleman, that he was only actuated by a high sense of duty.

And while I regret the necessity of disregarding any of his official acts, the right of the parties in this case, the interest of public justice, and a due regard to judicial integrity, impels that course.

The order being vacated, the motion pending for an injunction will be determined upon its merits.

NOTE.

Immediately upon the delivery of the above opinion, the complainants dismissed their bill and obtained leave of the court to withdraw it from the files with a view of obtaining an order for an injunction from one of the supreme judges.—Ed.

(Circuit Court of Cook County.)

Joseph B. Weil

vs.

National Post Card Company, of New York.

(June, 1907.)

ATTACHMENT—RELEASE OF, BY EXECUTION OF RECOGNIZANCE, WHERE NO PROPERTY HAS BEEN PHYSICALLY TAKEN UNDER THE ATTACHMENT. Under sec. 15 of the Attachment Act, a defendant may by entering into a recognizance in open court conditioned that he will pay the amount of the judgment and costs which may be rendered against him in the suit, release the garnishee from the operation of the attachment though no property has been physically attached.

Motion to release garnishee in attachment proceedings by entry into a recognizance. Heard before Judge John Gibbons.

Max Robinson, attorney for plaintiff.

Blum & Blum, attorneys for defendants.

GIBBONS, J.:—

This is an attachment proceeding wherein no property has been physically taken, but a number of persons said to be indebted to the defendant have been garnisheed, and defendant, in order to release those garnisheed from the operation of the attachment, seeks to enter into a recognizance in open court, conditioned that the defendant will pay the amount of the judgment and costs which may be rendered against it in the suit, as it claims it has the right to do under section 15 of the attachment act. The learned counsel for plaintiff resists the motion, contending that where no property is taken under the attachment writ the statute does not authorize the giving of a bond or the entry of a recognizance, and hence arises the question as to what is the true intent and meaning of sections 14 and 15 of the attachment act, which read as follows:

“Section 14.—The officer serving the writ shall take and retain the custody and possession of the property attached, to

answer and abide by the judgment of the court, unless the person in whose possession the same is found shall enter into bond and security to the officer, to be approved by him, in double the value of the property so attached, with condition that the said estate and property shall be forthcoming to answer the judgment of the court in said suit. The sheriff, or other officer, shall return such bond to the court in which the suit is brought, on the first day of the term to which such attachment is returnable.

“Section 15.—Any defendant in attachment, desiring the return of property attached may, at any time except in term time, at his option, instead of or in substitution for the bond required in the preceding section, give like bond and security, in a sum sufficient to cover the debt and damages sworn to in behalf of the plaintiff, with all interest, damages and costs of suit, conditioned that the defendant will pay the plaintiff the amount of the judgment and costs which may be rendered against him in that suit, on a final trial, within ninety days after such judgment shall be rendered. In term time, a recognizance, in substance as aforesaid, may be taken in open court, and entered of record, in which case the court shall approve of the security and the recognizance made to the plaintiff, and upon a forfeiture of such recognizance judgment may be rendered and execution issued as in other cases of recognizance. In either case, the attachment shall be dissolved, and the property taken restored, and all previous proceedings, either against the sheriff or against the garnishees, set aside, and the cause shall proceed as if the defendant had been seasonably served with a writ of summons.”

So far as I have been able to ascertain the precise question here involved has not been passed upon by the courts of this state. Section 14 of the attachment act provides for a forthcoming bond that may be given by the defendant to the sheriff, or other officer, for the purpose of enabling the defendant to retain the control of property levied upon under an attachment writ until final judgment. The condition of such a bond is that the defendant will surrender the property to the sheriff, or other officer, and that said property

shall be forthcoming to answer the judgment of the court in the suit in which the attachment writ was issued.

In the recent case of *Snyder v. Powell*, which has not yet been officially reported, the appellate court of this district holds that the court could not compel the officer to accept from the defendant a forthcoming bond or to surrender the property attached to the defendant. Consequently, the court holds that an order committing the constable for contempt because of such refusal on his part to comply with an order directing him to accept a bond and surrender the property was null and void, as the court was without jurisdiction in the premises.

Section 15 of the same act provides that "any defendant in attachment, desiring the return of the property, may, at any time except in term time, at his option" enter into a recognizance in open court or give bond to the sheriff conditioned that the defendant will pay the plaintiff the amount of the judgment and costs which may be rendered against him in that suit, on a final trial, within ninety days after such judgment shall be rendered. "In either case, the attachment shall be dissolved, and the property taken restored, and all previous proceedings, either against the sheriff or against the garnishees, set aside, and the cause shall proceed as if the defendant had been seasonably served with a writ of summons."

Under section 14, the property—the thing itself, shall be forthcoming to answer the judgment. While under section 15, all previous proceedings either against the sheriff or against the garnishees set aside, and the cause shall proceed as if the defendant had been seasonably served with summons. Why should the legislature have used the word garnishees in the latter section and not in the former if this section was not intended to apply to a case similar to the case at bar? The legislative intention becomes the more apparent by the use of the word either—all previous proceedings either against the sheriff or against the garnishees set aside, and the cause shall proceed, etc.

The evident purpose of the statute is to enable a defendant

to exercise the option of permitting the cause to proceed in the usual way or to give a recognizance to pay whatever judgment might be rendered against him and thereafter the cause would proceed *in personam* the same as if no writ of attachment had issued. Indeed, our supreme court has held that the giving of such bond for the payment of the judgment entirely does away with the attachment and makes the action simply one in *assumpsit*. *People v. Cameron*, 2 Gilman, 468; *Hill v. Harding*, 93 Ill. 77.

Counsel contends that section 21 of chapter 11, being the attachment act, provides only for the service of garnishee process in case the sheriff is unable to find property of any defendant sufficient to satisfy the attachment writ. But that is not a correct construction, because the supreme court had held that it is not necessary to have a return of *nulla bona* before garnishment process may be served. *Cariker v. Anderson*, 27 Ill. 358. It is quite manifest that a chose in action is property. Bouvier's Law Dictionary, 387; *Burgess v. Capes*, 32 Ill. App. 372; *Capes v. Burgess*, 135 Ill. 61. Moreover, the appellate court has held that the garnishment act and section 15 of chapter 11 above quoted are to be construed together. *Burgess v. Capes*, 32 Ill. App. 372.

That a chose in action is regarded as property is shown by a reference to the garnishment act. Section 20 of chapter 62, Starr & Curtiss Ann. Statutes, provides for the surrender by the garnishee to the sheriff of goods, chattels, choses in action or effects other than money belonging to the defendant. See *Nolte v. Von Gassy*, 15 Ill. App. 230.

Section 21 of the same act provides regarding goods that are mortgaged or pledged and are in the hands of a garnishee. And section 23 provides that all goods, chattels, choses in action and effects received by the officer under either of the two preceding sections shall be sold and disposed of in the same manner as if they had been taken on execution. Section 25 of the same act provides that if any garnishee refuses or neglects to deliver any goods, chattels, choses in action or effects in his hands when thereto lawfully required by the court shall be liable to be attached and punished as

for contempt and gives the court power to award execution against the garnishee. It thus appears that if the chapter on garnishment and chapter on attachment are construed together, and they must be, according to the decision of the appellate court above cited, then it follows that the legislature has recognized choses in action as property. Independently of the decision of the appellate court above cited it is a familiar rule of construction that where different statutes relate to the same subject they must be construed together. A further citation upon this point is unnecessary.

There certainly can be no question but that the money of the debtor in the hands of a bank may be attached where the defendant is a non-resident, and this property will give the court jurisdiction. *Pomeroy v. Rand*, 157 Ill. 176; *American & English Encyclopedia of Law*, page 1101, par. 4; page 1107, par. 2; page 1197, par. 16; page 1108, par. 9. In the last section it is said that the service of process of garnishment operates to place the property in the hands of the garnishee, constructively *in custodia legis* and is an effectual attachment of the property and effects of defendant in the garnishee's possession.

It follows that the motion of defendant for leave to enter into a recognizance must be sustained and it is so ordered.

(Circuit Court of Cook County. In Chancery.)

Chicago and Cook County Branch National Stone Cutters
Society of the United States, et al.

VS.

Journeyman Stone Cutters Association of North America.

(April 18, 1906.)

1. **STRIKES—INJUNCTION NOT ISSUED AGAINST PEACEABLE PERSUASION.**
An injunction against peaceable persuasion by strikers refused because of the difficulty of drawing the line between peaceable persuasion and actual intimidation.

2. **SYMPATHETIC STRIKES—BOYCOTT—INJUNCTION.** A sympathetic strike is nothing more or less than a boycott within the Illinois statute, and such boycotts may be enjoined.
3. **SYMPATHETIC STRIKE BY RIVAL UNIONS—INJUNCTION.** A union of stone-cutters and its members complained that a rival union of stone-cutters as well as other unions of men employed in the building trades were endeavoring by force, violence and persuasion to secure the complainants' discharge from their occupation and were also threatening to call a strike of all union men employed on any buildings on which complainants were employed, in other words, a sympathetic strike. *Held*, that an injunction would issue against such acts.

General number 269,695. Bill for an injunction.

A. C. Allen, solicitor for complainants.

J. F. Brady, solicitor for defendants.

MACK, J.:—

A union of stone cutters and its members complain that a rival union of stone cutters, as well as other unions of men employed in the building trades, are endeavoring, by force, violence and persuasion, to secure the complainants' discharge from their occupation, and are also threatening to call a strike of all union men employed on any buildings on which complainants may be employed; in other words, a sympathetic strike. The object, as alleged, is to break up the complainants' union and to compel them to join the defendants at what is alleged to be an exorbitant initiation fee. Defendants do not object to an injunction against violence, force or intimidation or the threats thereof. They do object to an injunction against persuasion, and also to an injunction against their calling a sympathetic strike.

Whilst it is perfectly true that persuasion may change instantaneously into intimidation, and whilst it is likewise true that in the history of Chicago strikes, peaceable persuasion, which is the only real persuasion, has been rare, and intimidation and violence but too common, nevertheless the court must recognize the possibility of peaceable methods in labor struggles. It should not give the striker an excuse to indulge in illegal methods by forbidding him to use the lawful weapons of peaceable argument. Until the higher courts declare

that "peaceable persuasion" is a pure fiction or that the use of it is illegal, this court is not disposed to enjoin persuasion that is really peaceable, because of a fear that the line between peaceable persuasion and actual intimidation may be difficult to draw. In failing to enjoin peaceable persuasion, the court desires it distinctly to be understood that language is not the sole criterion of the methods adopted; that the attitude, the voice, the gesture, even the numbers of those alleging that they are persuading, may be sufficient to turn that which would otherwise be peaceable persuasion into intimidation and coercion or the threat thereof. In carefully limiting the order of injunction so as not to forbid that which is lawful, and in punishing swiftly and severely any indirect as well as any direct violation thereof, the court believes that justice will be best served. For this reason the court has substituted in the injunction order submitted by complainants the phrase "persuasion that is not peaceable" for the word "persuasion," in accordance with the precedents established in the Piano and Organ Workers case (124 Ill. App. 353).

It is unnecessary in this case to express an opinion on the legality of a strike called to enforce the "closed shop," the purpose and object of which is not to confer a direct benefit on the striker, by securing higher wages or shorter hours, but an indirect benefit by securing exclusive employment. Whether such indirect benefit, involving, as it does, direct injury to those who are sought to be shut out from employment, is a sufficient justification for calling a strike, is a point on which the courts differ. The sympathetic strike, however, is not a clashing of competitive forces; its object is not to better the condition of the striker himself, but to assist his friend by injuring that friend's opponent. Whatever justification there may be for injury to another, when, in the battle of life, one's own rights are endeavored to be protected, there is no legal justification for such injury when the purpose of it is not self-preservation but aid to another. Nor is the possible indirect and remote benefit that might result to each of several confederated but non-competing unions a sufficient justification for the direct infliction of in-

jury on third persons. But whatever be the common law, it seems clear that the sympathetic strike is nothing more or less than a boycott within the language of the Illinois statute. To order a plumber, for example, to strike for the purpose of compelling the contractor to discharge one set of stone cutters with whom he is entirely satisfied, and to employ another set whom he does not want, is to establish a boycott against the first set of stone cutters. It threatens harm and injury to their customer, the contractor, unless he desists from dealing with them. As the appellate court has held in the Piano Workers case, it is the duty of the court of equity in this state to enjoin such a boycott. *Piano & Organ Workers' International Union v. Piano & Organ Supply Co.*, 124 Ill. App. 353.

Modified as aforesaid, the injunction prayed for is granted on complainants giving bond in the sum of one thousand dollars.

NOTE.

The injunction issued by the court in the above case was as follows:

To Chicago Branch of Journeymen Stone Cutters' Association of North America, Charles Baumann, Chicago Journeymen Plumbers' Benevolent and Protective Association, Thomas Kearney, John J. Bushnell, Journeymen Steam Fitters' Protective Association, Charles M. Rau, Junior Steam Fitters' Protective Association, Martin "Skinny" Madden, Architectural Iron Workers' Union of Chicago, Frank Thoman, Steam Pipe and Boiler Coverers' Union, Walter Olson, Electrical Workers' Union, Local Number 134, Charles Bloomfield, Associated Building Trades of Chicago and Cook County, and Charles M. Rau, and your attorneys, solicitors, agents and servants, and to each and every of them, GREETING:

WHEREAS, it has been represented unto the Honorable Julian W. Mack, one of the judges of the Circuit Court of Cook County, in the State aforesaid, on the part of Chicago and Cook County Branch National Stone Cutters' Society of United States, Michael Benson, Michael Nader, John Toussaint, John Knowl, John Miller, Thomas Norman, August Wielandt, William Van Dyke, W. H. Mitchell, Albert Norman and Harry Green, complainants in the certain bill of complaint exhibited before said judge and filed in said court against you, the said above named defendants, among other things that you are combining and confederating with others to injure the complainants, touching the matters set forth in their said bill, and that your

actings and doings in the premises are contrary to equity and good conscience. And the said judge having duly entered an order that a writ of injunction issue out of said court, according to the prayer of said bill. Therefore, in consideration thereof, and of the particular matters in said bill set forth, do strictly command you, the said above named defendants and your confederates and you and each of your servants and agents and any and all persons aiding or assisting you or any of you now or hereafter confederating or acting in concert with you or any of you, that you do absolutely at all times hereafter desist and refrain from in any manner by any of the means hereinafter specified interfering with, hindering, obstructing or stopping complainants, or any of them, in their employment and occupation as stone cutters or stone carvers in the city of Chicago, or elsewhere;

And also from entering into or upon the grounds, places or buildings where the complainants, or any or either of them, may at any time be at work, for the purpose of interfering with, hindering or obstructing, or in such a manner as to interfere with, hinder, or obstruct complainants or any or either of them in their said occupation or in the carrying out of any contract of employment heretofore or hereafter entered into by complainants, or any or either of them, by any such means, or for the purpose of compelling or inducing, or in such a manner as to compel, induce or attempt to compel or induce, by force, intimidation, violence, or threats thereof, or by persuasion that is not peaceable, any employer or employers of complainants, or any or either of them, to refuse to carry out any contract or contracts which such employer or employers may now or hereafter have with complainants, or any or either of them; and by the like means from procuring or causing any employer or employers of complainants, or any or either of them, to discharge complainants, or any or either of them; or by the like means from doing any acts to prevent complainants, or any or either of them, from performing their work wherever they may at any time be employed;

And also from compelling or inducing, or attempting to compel or induce, by intimidation, force, violence, or threats thereof, or by persuasion that is not peaceable, any employer or employers of complainants, or any or either of them, at any time to discharge complainants, or any or either of them, or interfere with them, or any or either of them in the performance by them of their work and duties as stone cutters or stone carvers;

And also from preventing or attempting to prevent any person, firm or corporation whatsoever, by threats, intimidation, force or violence, or threats thereof, or by persuasion that is not peaceable, from employing complainants, or any or either of them, in or upon any contract, job or work whatsoever;

And also from compelling or inducing, or attempting to compel or induce by intimidation, force, violence, or threats thereof, or by persuasion that is not peaceable, any person, firm or corporation employing complainants, or any or either of them, at any time, to discharge complainants, or any or either of them, or to refuse to retain complainants, or any or either of them, in their said trade and occupation;

And also from entering into any conspiracy or confederation or combination to restrain or obstruct complainants, or any or either of them, in and about their said employment, wherever they may now or hereafter be employed in the city of Chicago;

And also from inaugurating, instituting, maintaining or enforcing any boycott against the complainants, or any or either of them, in the city of Chicago;

And also from instituting or maintaining any strike in the city of Chicago, for the purpose of compelling complainants, or any or either of them, to abandon the complainant organization, Chicago and Cook County Branch National Stone Cutters' Society of the United States, or join the defendant organization, Journeymen Stone Cutters' Association of North America, until this honorable court in chancery make other order to the contrary. Wherefore fall not under penalty of what the law directs.

To the sheriff of said county to execute and return in due form of law.

Witness, James J. Gray, clerk of said court, and the seal thereof at Chicago, aforesaid, this 18th day of April, A. D. 1906.

[SEAL.]

JAMES J. GRAY, Clerk.

(Superior Court of Cook County. In Chancery.)

Nickerson, et al. v. Kimball, et al.

Barton, et al. v. Same.

Coolbaugh, et al. v. Same.

Blair, et al. v. Same.

Fairbank, et al. v. Same.

Sturges, et al. v. Same.

(May 9, 1877.)

1. **TAXATION OF NATIONAL BANK STOCK.** The statute provides that the stockholders in every bank located in Illinois shall be assessed and taxed on the value of their shares of stock therein;

that this tax shall be levied according to "valuation." These provisions are in harmony with the constitution inasmuch as an error in the views different men may take of values does not show want of "uniformity."

2. **COUNTY BOARD—COMPLAINT.** The county board, acting as a board of equalization, may review and correct an assessment on shares of stock as shall appear to be just, upon complaint to the board, provided the person assessed, or his agent shall be notified of such complaint, if a resident of the county.
3. **JURISDICTION—NOTICE.** The board of review cannot review an assessment without special notice to the persons affected thereby.
4. **NOTICE—HOW AND TO WHOM IT MAY BE GIVEN.** It is error in the state board of equalization to make and correct an assessment without special notice to the person affected thereby. Notice is sufficient when actually brought home to such party. Appearance before the board to resist the review and correction of an assessment is a waiver of the right to notice. Notice to an agent is sufficient.
5. **TENANT—NOTICE SERVED UPON.** A notice served upon the tenant is not a sufficient service upon the landlord.
6. **DIRECTOR—SUFFICIENT NOTICE TO.** It is a general rule that notice to an individual director, who has no duty to perform in relation to the subject-matter of the notice, is not a notice to the corporation.
7. **AGENT—NOTICE TO BIND PRINCIPAL.** It is a fundamental principle that notice served on the agent to bind the principal must be served whilst the agent is acting within the scope of his agency.
8. **BANK—AGENT OF STOCKHOLDERS.** The statute makes the bank the agent of the stockholder, for some purposes connected with the taxation of the shares of stock. The bank acts as quasi trustee in managing the business of the shareholders. Notice to the bank is therefore notice to the stockholders.
9. **COMPLAINT—NOTIFICATION—SUFFICIENCY OF.** Any one may complain that another is assessed too low, but such complaint cannot be acted upon until the party assessed, or his agent, shall be notified of such complaint. The complaint should contain some traversable fact, and not be vague and general, so that the party appearing may be informed of the matter which he is called to meet.
10. **EQUITY—JURISDICTION TO RESTRAIN COLLECTION OF TAXES.** A court of equity will not restrain the collection of taxes except in cases where the property assessed is exempt, or the tax is unauthorized or unless there is fraud.
11. **TECHNICAL OBJECTIONS.** Mere technical objections not affecting the justice of the tax itself, should not be regarded.

Bill for injunction. Heard before Judge Moore. The facts are stated in the opinion.

Charles Hitchcock, Wirt Dexter, Sidney Smith, Melville W. Fuller, Geo. W. Kretzinger, attorneys for plaintiffs.

Elliott Anthony and John M. Rountree, attorneys for defendants.

Judge MOORE delivered the opinion of the court:—

The constitution of the state provides for raising revenue by levying taxes, by or according to "valuation" of the property to be taxed; everyone shall be taxed and pay in proportion to the value of his property. This rule is extended to persons and corporations owning or using franchises and privileges. Taxes must be "uniform" in respect to persons and property; every law that imposes a tax must regard every man alike, *vide* Constitution, art. 9, secs. 1, 9, 10, Hurd's Rev. Stat., pp. 74, 75.

The law must not discriminate for or against any one. It must be uniform. The law enacted under the constitution must be enforced by men who may err in judgment, and therefore burdens may fall unequally. This will result from the different views that different men may take of values and the like, and does not show that the law imposing a tax is wanting in the principle of uniformity. This principle of uniformity must extend to every person and to every corporation.

"Personal property . . . shall be valued at its fair cash value." Chap. 120, sec. 3, Hurd's Rev. Stat., p. 857.

"*The stockholders* in every bank located within this state, whether such bank has been organized under the banking laws of this state, or of the United States, shall be assessed and taxed on the value of their shares of stock therein, in the county, town, district, village or city where such bank . . . is located, and not elsewhere, whether such stockholders reside in such place or not. . . . Taxation of such shares shall not be at a greater rate than is assessed upon any other monied capital . . . where such bank is located." Sec. 35.

In each of said banks there shall be a list of the names and residences of its stockholders, and of the number of shares held by each. This list shall be open to the inspection of the revenue officers, "and it shall be the duty of the assessor to ascertain and report to the county clerk a correct list of the names and residences of all stockholders in any such bank, with the number and assessed value of all such shares held by each stockholder." Sec. 36.

"The county clerk . . . shall enter the valuation of such shares in the tax lists in the names of the respective owners of the same, and shall compute and extend taxes thereon the same as against the valuation of other property in the same locality." Sec. 37.

This tax is declared to be a lien upon the respective shares of stock. Sec. 38.

It is made the duty of the bank or its officers to retain the dividends belonging to the respective stockholders until the tax shall have been paid. Any officer violating this provision of the law shall thereby become liable for such tax. The collector may sell the shares of stock when the owner refuses to pay the tax. Chap. 120, secs. 35, 36, 37, 38, 39, Rev. Stat. p. 864 (1874).

There can be no question but that these provisions of the law are in harmony with the constitution. The "valuation" is required, as is "uniformity," and all as provided by the constitution. The law makes the same provision in valuation to every one who may own the stock of the various banks in the state. If the tax imposed by this law operates unequally, it must be because the law itself is not complied with.

It was seen that the assessor must be a man, and so might fail in discharging his duty. Hence the county board, acting as a board of equalization, may review and correct what has not been done correctly. "On the application of any person considering himself aggrieved, or who shall complain that the property of another is assessed too low, they shall review the assessment and correct the same as shall appear to be just." That is to say, if any one thinks his property has been valued too high, and so considers himself "aggrieved," he may com-

plain, and if the board regard his complaint as well founded, then they will review and correct the assessment, by reducing the valuation; or it may be some one thinks that burdens are not equal, and so "complains that the property of another is assessed too low." It is then the duty of the board to review and correct the assessment as shall appear to be just. If the complaint is well founded, as in the former case, the assessment can be corrected only by increasing the "valuation." However, it is provided that "no complaint that another is assessed too low shall be acted upon until the person so assessed or his agent shall be notified of such complaint, if a resident of the county." Chap. 120, sec. 97, subsec. 2, Rev. Stat. p. 873.

One other provision of the statute has been referred to in considering these cases. That provision, it is claimed, modifies the other provisions referred to materially, modifies many decisions of the supreme court. It is provided (*inter alia*) that "no error or informality in *the proceedings* of any of the officers connected with *the assessment*, levying or collecting of the taxes, *not affecting the substantial justice of the tax itself*, shall vitiate or in any manner affect the tax or the *assessment* thereof." Chap. 120, sec. 191, Rev. Stat. p. 890. True it is, this provision is found in the middle of a section that is providing for the proper mode of rendering judgment on the delinquent tax lists; but yet there is no language or words used in any other part of the section that changes, or modifies, or limits the meaning of the provision enacted. The words would mean the same, neither more nor less, if they stood alone in a separate section, or in any other connection.

The provisions under consideration, when brought together, then, may be read in this way: Any one may complain that another is assessed too low, but such complaint shall not be acted upon until the person so assessed, or his agent, shall be notified of such complaint, if a resident of the county; and no error or informality in the proceedings of any of the officers connected with the assessment, levying or collecting of the taxes, not affecting the substantial justice of the tax

itself, shall vitiate or in any manner affect the tax or the assessment thereof.

Nickerson *et al.* aver that they are shareholders of the stock of the First National Bank of Chicago. Barton *et al.* are shareholders of the stock of the Fifth National Bank of Chicago. Coolbaugh *et al.* are like shareholders of the stock of the Union National Bank of Chicago. Blair *et al.* are shareholders of the stock of the Merchants' National Bank of Chicago. Fairbank *et al.* are shareholders of the stock of the Commercial National Bank of Chicago; and Sturges *et al.* are the shareholders of the stock of the Northwestern National Bank of Chicago. The respective complainants make substantially the same averments. The complainants are all residents of the county of Cook, and the respective banks are located in Chicago.

In addition to other averments which are necessary to give jurisdiction, it is averred that the shares of stock of each bank were "assessed and taxed on the value of the shares;" that the assessor of the town of South Chicago, as such assessor, listed the shares of the capital stock of the respective banks for taxation, he giving the valuation thereof as fixed by himself; that this assessment so made by him was returned to the county clerk; that then it was the duty of the clerk to enter the valuation of the shares, as made by the assessor, in the tax lists, in the names of the respective owners, and compute and extend the tax therein on the valuation so made; that these things are required by the provisions of the statutes hereinbefore quoted; "that the assessor, in making the assessment for the year 1876, listed all bank shares and like property at one-third of the value which in his judgment said shares were actually worth."

To this point no question is raised but that the law has been complied with. But complaint was made by persons stating that they considered themselves aggrieved, and complained that the personal property of the following named persons, firms and corporations have been assessed too low for the year 1876, to wit: *shareholders* "of the stock of the respective banks, and designating the name of the bank.

This complaint was addressed to the Board of Commissioners of Cook County, and those complaining asked the board to review the assessments for 1876 of said persons, firms and corporations, and correct the same as shall appear to be just." This was the only complaint that was filed, and the only notice of this complaint was given to the presidents or cashiers of the banks.

The board did review the assessments, and corrected them by increasing the valuation very considerably; but in no case did the valuation or assessment thus increased amount to more than one-third of what appears to be fair cash market value of the respective shares of stock. It is admitted that the stock is personal property, and it is not claimed by any complainant that the shares, by either the assessor or board, were "valued at their fair cash value."

The complainants aver that the county board had no jurisdiction of the matter, or, rather, of the persons of the complainants, until the complainants or their respective agents had notice of such complaint; and they claim that neither the bank or any officer of the bank was agent of the shareholders.

A number of authorities are referred to by the learned counsel to show that the question of notice is *jurisdictional*. It is perhaps by some of the counsel conceded that the county board had jurisdiction of the subject-matter, and it is claimed that the said board could have jurisdiction of the persons residing in Cook county only when they have notice. This notice is not required as to any one residing beyond the limits of Cook county. If the complainants be correct, then the fact that notice to non-residents is not required must operate as a hardship. It is not protecting all alike. It must be borne in mind that the valuation or assessment made and returned by the assessor is made by procuring the necessary information from the bank. The officer calls at the bank and makes his list, and then the valuation is made and returned. Of this fact and of the additional fact that dividends must be retained by the bank until the tax is paid, every person must take notice. This assessment and this return, it may be said, is the matter that, in the first place, con-

fers jurisdiction or sets in motion the officers and those having jurisdiction. It has been held in our own state, "that where the board of supervisors exercise the power to revise the assessment of an individual, he must have notice, and an opportunity to be heard, before it can be legally done." *Cleghorn v. Postlewaite*, 43 Ill. 428; *Darling v. Gunn*, 50 Ill. 424; *First National Bank of Shawneetown v. Cook et al.*, 77 Ill. 622.

This last named decision was made under the law as it existed March 7, 1873. The provision of the law that is supposed to modify the law as it then existed, took effect July 1, 1873, and provides that no error or informality not affecting the substantial justice of the tax itself shall vitiate or affect the tax or the assessment thereof.

In the case of *Darling v. Gunn*, 50 Ill. 429, the court holds: "The tax, to the extent it was increased, . . . having been levied on an unauthorized assessment, made by persons having no jurisdiction of the person to make the assessment, without notice to appellant, its collection should have been enjoined."

This case falls within the former decisions of the court, in which it is held that a court will not interfere to restrain the collection of a tax unless it is levied by persons having no authority. As the law then stood, it was incumbent on the court to find that error existed; but it was not necessary to find more than that error existed. That was all that was required. It was not necessary to pass upon the jurisdictional question. As the law now stands, this inquiry is necessary, since the court will not enjoin the collection of a tax for mere error or informality. It cannot be that the various officers must give notice to every one specially concerned before they can act in relation to the assessment of taxes.

In the case of the *National Bank of Shawneetown v. Cook*, 77 Ill. 622, the assessment had been made and corrected by the state board of equalization, and then, without notice, the valuation was increased; and the court holds that "it is a proposition upon which there can be no doubt that the board had no power to make any change in the assessment without

notice to appellant." By this language the court is understood as holding no more than that it was simply error in the board to exercise the power without special notice to the persons to be affected thereby. That was the direction of the statute, and it is still the direction of the statute, and to disregard it is an error.

In the case of *Mix v. People* (72 Ill. 241), it was held that the levy must be made within the time prescribed by law, or it would be void. Was it necessary for the court to hold language so strong? Was it intended to decide anything more than that, as the law then existed, it was such an error as vitiated the levy of the tax? The supreme court afterward said: "It is also urged that the local taxes were not levied and returned to the clerk in time; and in support of the position, the case of *Mix v. People*, June term, 1874, is referred to as controlling this. That tax was levied under the law of 1872, whilst this is under the statute of 1873, which amends the prior law, see sec. 191, p. 890, Rev. Stat. 1874. That section declares that no error or informality in the proceedings of any of the officers connected with the assessment, levying or collecting of the taxes, not affecting the substantial justice of the tax itself, shall vitiate or in any manner affect the tax or the assessment thereof. This provision most effectually disposes of this question." *Buck v. The People*, 78 Ill. 560.

Then again it is held by the supreme court: "It is again urged that the certificates of the levy of the local municipal taxes were not filed in the time required by the statute. The answer to this is, as was said in *Buck v. The People*, *supra*, that it is cured by the 191st section of the Revenue Law. This cures all defects growing out of the failure to file the certificate on or before the day named in the 122d section." *Chiniquy v. The People*, 78 Ill. 570, 575.

In the section 122 referred to in the last-cited case, the provision is positive, and appears to be mandatory: "The proper authorities . . . collecting taxes . . . shall annually, on or before the second Tuesday in August, certify," etc., sec. 122, Rev. Stat. 878. This language is not less peremptory

than the language used in section 97, Rev. Stat. 873. "No complaint that another has been assessed too low shall be acted upon until the person so assessed or his agent shall be notified of such complaint, if a resident of the county," and yet it is held that since the adoption of sec. 191, Rev. Stat., the fact that the certificate is not filed in apt time is not such an error as will vitiate either the tax or the assessment. "The amendment introduced into the 191st section of the present revenue law has produced a radical change in proceedings to recover judgment for delinquent taxes, and has overruled or modified most, if not all, of our previous decisions on the questions thus arising," *vide Chiniquy v. The People, supra*.

It will be borne in mind that in all these cases the people were seeking judgments, and must show jurisdiction.

In the cases now under consideration, those denying the jurisdiction are the complainants. They must make out their respective cases. The People in the cases cited must show that all the officers have complied substantially with the law, or they fail. In these cases now being considered, the complainants take upon themselves to show that the county board had not jurisdiction of the persons of the complainants; and this they must do by overcoming the presumption that a lawful tribunal, in the exercise of its duties, confines itself to whatever authority has been conferred upon it. This is especially true when it is conceded that the tribunal has jurisdiction of the subject-matter of the controversy.

Can it be questioned that the law might provide for the assessment, and review of the assessment, without notice to any one? But courts cannot render a judgment until there is a service of process, either actual or constructive. A judgment without service of some kind would be void and nugatory in every land. And yet, such a rule will not be applied to any tax or revenue matter.

The fact that a man must be taxed on all that he has and that he must be so taxed every year is known to and by every one. The assessor is directed to call on him or on his agent and assess his property. He knows that must be reported,

and he should take some notice of what is done in the premises thereafter. There is recognized no provision of sec. 97 that fails to require notice to the shareholders of stock not residing in Cook county. As opposed to this view the learned counsel refers to a New York case. School trustees levied a tax for school purposes. In making up the assessment roll the valuation of plaintiff's property was increased from the valuation thereof upon the town assessment roll. Before making the roll the trustees gave no notice. This assessment is an *original* assessment, made without any call upon the taxpayer: so that it might well be said there is no jurisdiction of his person until he has notice. In that case the learned chief justice reviews the authorities, and says "the authorities are not entirely in harmony and the precise question has not been passed upon by this court." The opinion concludes "that the weight of authority is that the omission to give the notice is a jurisdictional defect," *vide Jewell v. Van Steenburgh*, 58 N. Y. 85. These school trustees were allowed to take the assessment roll of the town assessors, and upon proper notice make such changes as to them might seem right; and then for school purposes the trustees could levy their tax. This was as truly an original assessment as that made by the town assessor. There was no original call so as to confer the jurisdiction. It is not clear that this authority is opposed to the suggestions herein made.

A well-considered New Hampshire case is referred to, and judgments that are void or only voidable, are carefully discussed.

It is found by the court that tribunals which have jurisdiction of the subject-matter are not absolutely void by reason of any irregularity or illegality of the proceedings in general, but they are avoidable by proper and timely objections. *The State v. Richmond*, 26 N. H. 232.

If it still be claimed that there was no jurisdiction of the persons of the complainants until they respectively, or their agents, had notice, and that the county board could not review the assessment until such notice had been given, then it becomes an important inquiry how and to whom may such

notice be given? There can be no question but that if knowledge was brought home to any of the complainants, such as had the knowledge must be regarded as having had notice. "Actual notice exists where knowledge is actually brought home to the party to be affected by it" (*Bouvier's Law Dictionary*). It will be readily conceded that notice to an agent is notice to the principal. If doubted at all it must still be true in the case under consideration, since the statute requires notice to the party *or his agent*. Then, if knowledge is actually brought home to the agent of the complainants they must be regarded as having notice, even if they had, in point of fact, no knowledge that the complaint had been made to the county board that their shares of stock had been assessed too low. It is claimed by one of the counsel that notice to one of his clients, as president of the bank, was not notice to him personally. If knowledge of a fact be notice, and sometimes more than mere notice, then this position cannot be maintained. The statute does not say what kind of notice must be given. It simply requires notice. If any officer of a bank have knowledge that the complaint has been made, and he be the owner of any of the shares of stock, he cannot be allowed to say that he individually has no notice. He has more than notice. He has actual, positive knowledge that the complaint is made. In this view there can be no question.

In addition to such actual knowledge, it appears that some of the officers, who are complainants, actually appeared before the county board and opposed the complaint. A party appearing in a suit, with or without service, cannot afterward deny that he is properly before the court. A party appears and cross-examines a witness when giving a deposition; he cannot afterward say he did not have notice of the time and place of taking the deposition. These are familiar principles, admitted by all, and show conclusively that such as appeared before the county board, and resisted the review and correction of the assessment, will not be allowed to deny that they had notice of the complaint. What is notice to

those who had no such knowledge? What is notice to such as did not appear and oppose the correction?

The notice required is not, in every particular, like unto the process to be served on a party to bring him before the court. Original process cannot, as a general thing, be served on an agent. In this matter it is only necessary that the agent be notified. The revenue law deals with shares of stock and taxes them as the personal property of each shareholder, and such a tax is not a tax on the capital or property of the bank. *State, Farmers' National Bank v. Cook*, 32 N. J. L. 347; *Van Allen v. Nolan*, 3 Wallace, 573.

The case of *Farmer's Bank v. Cook*, *supra*, does not pass upon the question of service of notice otherwise than as by way of argument. Counsel refers to the case of *State v. Drake*, 33 N. J. L. 194. In that case it is correctly held that a notice under the tax law, served upon the tenant of the one complaining of the tax, is not a sufficient service. There is no reason in concluding that a man's tenant is his agent. It would be more reasonable to select a man's regular attorney or solicitor, and yet it will hardly be contended that such notice might be served on such attorney or solicitor. It is held that a notice to a bank cannot be served on a director having no share in the management of the matter about which the notice is given. The directors or trustees, when assembled for the transaction of business, are the agents of the corporation, and notice to them, when thus assembled, is notice to the corporation and binding upon their successors. But notice to an individual director, who has no duty to perform in relation to the subject-matter of the notice, is not a notice to the corporation. *Powles, etc., v. Page*, 3 Manning E. & S., 16; *The Fulton Bank v. The New York & Sharon Canal Co. et al.*, 4 Paige, 127.

This general doctrine will not be questioned, and yet in our state the statute provides that a process against a corporation may be served upon a "clerk," "cashier," "director," etc., if the president shall not be found in the county.

Again, it is held, and is certainly a fundamental principle,

that notice served on the agent, in order that it may bind the principal, must be served whilst the agent is acting within the scope of his agency. *Müller v. Illinois Central Railroad Co.*, 24 Barbour, 312.

In this connection, whilst laying down general principles, it will be seen that the provision is not that notice shall be given to the principal, and may be given by delivering a copy of a notice to an agent of such principal. The language of the statute is, "no complaint . . . shall be acted upon until the person assessed, or *his agent*, shall be notified." That is to say, the principal may be notified, or, if more convenient, the agent only may be notified.

It is claimed that the bank is the agent of the shareholders of the stock. It is the duty of the corporation, by its officers, to so direct and manage its affairs as to preserve and promote the highest interest of those interested therein. It is true the officers act directly for the bank, but the bank is an artificial person and can have no interest to preserve or promote, save and only the rights and interest of the shareholders. None others can have an interest in the management. The bank owns the property, the land, the money, all the assets, the privileges and franchises; but the officers are elected by the shareholders of the stock, and they are selected for the purpose of managing well the property of the bank. The shareholders measure the value of their shares of stock by the value of the property and franchises belonging to the bank. If these be under unskillful or improvident management the amount of dividends and the value of the shares of stock are diminished. If the shares are valued and assessed at a high rate by the assessor, their productive resources are diminished to that extent. There can be no person so well qualified to determine the real productive and market value of shares of stock as the officers who manage and control the bank for the interest and benefit of the shareholders. "When shares of capital stock have any value as an article of sale, it is because the purchaser supposes that the tangible and intangible property and the franchises are sufficient, if the affairs of the company were wound up, to pay all the debts

and pay a surplus in distribution to the shareholders equal to the per cent the purchaser gives." *Ottawa Glass Co. v. McCaleb*, 9 Leg. News, 187;¹ *Porter, et al. v. Rockford, Rock Island & St. Louis Railroad Co.*, 76 Ill. 561.

It is self-evident that the value of an article of sale must depend largely upon the skill put forth in the management by the officers. It will be conceded that there is none so suitable to look after all matters pertaining to the assessment and taxing the shares of stock as the officers of the bank.

By the statute it is required that the bank shall keep the list of the names of the stockholders and of the number of shares held by each, and this list is for the inspection of the officers authorized to assess property for taxation. From the bank the officer obtains the information that enables him to make and return a list to the clerk.

"For the purpose of collecting the taxes it shall be the duty of every such bank, or the managing officer or officers thereof, to retain so much of any dividend belonging to the stockholders as shall be necessary to pay any taxes levied upon the shares, until it shall appear that such taxes have been paid." Secs. 36, 37, 39 Revenue Law, Rev. Stat. 864.

It is the bank that gives the information to the officer and enables him to value the shares. It is the bank that is required to retain the dividend until the tax is paid, and it is the officer of the bank who is made liable if the dividend is not so retained. It is thus made quite clear that the statute makes the bank the agent of the stockholder for some purposes connected with the taxation of the shares of stock. In the case of *The Ottawa Glass Co. v. McCaleb*, 9 Leg. News, 188,¹ it is stated that "a corporation acts as quasi trustees in managing the business of the shareholders, and it is competent to the general assembly to require the whole taxes to be paid by the corporation, which corporation may then require repayment of the tax on shares to be refunded by the shareholders, either by deducting the amount from dividends or otherwise."

It has been held by the Supreme Court of the United States,

¹ 81 Ill. 556.—Ed.

and by the courts of New York, New Jersey and of this state, that under the provisions of the act of congress, the right of the states to tax all shares in the stock of the national banks clearly exists. *First National Bank of Mendota v. Smith et al.*, 65 Ill. 44, and the various authorities there cited.

It has been held in the same case (*supra*) that the bank is the trustee of the stockholders (p. 54), "and as such possesses the lawful control over the rights and interests of the *cestuis que trust*, much greater than that of a *mere agent* for the loan of money."

"Certificates of stock are not securities for money, in any sense, much less are they negotiable securities. They are simply the muniments and evidence of the holder's title to a given share in the property, and franchises of the corporation of which he is a member." *Mechanics' Bank v. New York Railroad Co.*, 3 Kern. 627; *First National Bank of Mendota v. Smith*, 65 Ill. 44, 55.

The banking corporation has a fixed locality where it must transact its business, and there wind up its affairs when it ceases to exist. It is the trustee of the stockholders who must come to its counter for their annual dividends, and their share of assets on final liquidation. 65 Ill. 56, *supra*.

It is thus seen that the stockholder has a title to a share in the property and franchise of the bank, that he is one of the owners of the bank, that this property and the franchises are managed and controlled by officers selected by the stockholders, that it is managed for the stockholders, that the bank is the trustee of the stockholders, that it is peculiarly and especially the duty of the bank to do and manage everything so as to make the shares of stock valuable, and so as to make them yield a dividend, and to guard against everything that may diminish the amount of dividends. The conclusion is inevitable that the bank must be the agent of the shareholder; it was only necessary to give notice to the bank. It has been seen that even original process could be served on the bank by serving on the president, cashier or director. Some of these notices were served on the president and others on the cashier. There was then sufficient notice to give jurisdiction of the

persons of the shareholders. Was there a sufficient complaint? is the next question requiring attention.

The provision of the statute is, a citizen may "complain that the property of another is assessed too low." It is not stated what averments the complaint shall contain, nor is it stated whether the complaint shall be oral or written. The complaints in these cases contain nothing more than that they complain that the personal property of the shareholders of the several banks (naming them) has been assessed too low. It is objected that this is too uncertain; that no person is named, and no traversable fact is complained of, and that it is vague and general.

"To complain of an assessment set opposite to each name on the assessment list, and to ask that evidence may be heard in each and every case and every name on the assessment list, or to the value of the property therein assessed, and to change the value as may seem just, and that the valuation may be reduced or raised as may seem just and equitable," has been held to be too general and too vague and uncertain. "Such complaint states no fact and is nugatory." There should be something complained of, and the party appearing should be informed of the matters which he may be required to meet. *People v. Reynolds*, 28 Cal. 107, 111, and *People v. Flint*, 39 Cal. 670, 673.

The California statute may not be like our statute in every particular, but no reason is seen why the Illinois courts should hold differently from the authorities cited.

In the complaint held to be nugatory there was no complaint of any valuation, or of any parcel of property or to any species of property. It was not complained that the valuation was too high or too low. No person or class of persons is described in the complaint. In these cases under consideration no one person, but a class of persons, is named; no one article of property is described. The averment is, the shares of stock of the shareholders of the particular bank is valued too low. The complaint and notice might have named each particular shareholder, and they might have designated the number of shares owned by each shareholder. But why?

The shareholders, if named each by himself, and if told the precise number of shares owned by each, would not be the wiser for the information. The description, "shareholders in a particular bank," though not the names of persons, is so definite and certain, that no other persons can be mistaken for them. There can be no question as to who is meant. It is the stock, it is the shares of stock, that is described as assessed "too low." This can be easily understood. This would be the case even though there was nothing else in the record. But all these shares of stock had been regularly assessed to each respective owner thereof, so that the complaint and notice meant that the shares of stock belonging to each of the respective shareholders had been valued "too low." The notice and complaint must be held sufficient.

Finding the notice and complaint sufficient, it remains to inquire what wrong or what injustice has been or is about to be done to either of the complainants?

It has frequently been held that a court of equity will not entertain a bill to restrain the collection of taxes, except in cases where it has been assessed upon property not subject to taxation, or where the tax is unauthorized by law, or where the property has been fraudulently assessed at too high a rate. This doctrine has been announced so frequently, in so many cases and under such varied circumstances, and under such varied forms of expression, that it cannot be necessary to cite authority. But, for fear that a different doctrine might be insisted upon, the general assembly has enacted sec. 191 of the revenue law. And now "No error or informality in the proceedings of any of the officers connected with the assessment, levying or collecting of the taxes, not affecting the *substantial justice of the tax* itself, shall vitiate or in any manner affect the tax or the assessment thereof." In none of these bills is it claimed that any injustice has been done. The property is clearly subject to taxation. The tax is unquestionably authorized by law. It is not in any one of the bills claimed that the property has been assessed at too high a rate. It is not shown or claimed that anything has been done that affects the *substantial justice of the tax* itself. It

is simply averred that the assessment made and returned by the assessor was increased, and that it should not have been so increased. It is not claimed that the present valuation amounts to more than one-third the actual cash market value of the stock. There is but one exception to this statement. The shareholders of the Union National Bank state that the bank has been taxed on its real estate, and that when the shares of stock were assessed the value of the real estate should have been deducted from the gross value of the stock. They claim that this deduction was made in the assessment of the stock of all the other banks where they owned real estate. But, unfortunately for the shareholders of the Union National Bank, they fail to show that any injustice is done.

If the value of the real estate be added to the assessed value of the stock, the aggregate value falls considerably below one-half the actual cash value of the stock. They simply show that others are assessed entirely too low, whilst they are not yet assessed as high as as they should be. The propriety of assessing any property below its actual value may well be questioned, if not designated as pernicious. If all the property in the county and state was assessed at its actual value, the grand total would be increased so much that the actual wealth and resources of the state would be known and would amount to such an enormous increase over the present assessments that the rate per cent of taxation might be much reduced.

The statute provides that personal property shall be valued at its fair cash value, and yet if this cash value is imposed in only one county or town, it would be oppressive to the people of such county or town. The rule, to be of advantage, should extend throughout the state.

In no one of these cases has it been shown that the property is made to bear more than its just burden of taxation, nor have the owners been debarred of any substantial rights secured by the law of the land. The tax on the property is just, and no valid reason is made to appear why the owners should not pay it. A careful examination of the cases presented for the consideration of the court fails to show any-

thing that affects the substantial justice of the tax itself, and until this is shown the court cannot grant the relief sought.

"The statutes unmistakably show that it was the legislative will that mere technical objections not affecting the justice of the tax itself should not be regarded." *Beers, et al. v. The People*, 83 Ill. 488; *Buck v. The People*, 78 Ill. 560, 566; *Chiniquy v. The People*, 78 Ill. 570, 572; *Purrington v. The People*, 79 Ill. 11.

The law imposing the taxes is in all its parts "uniform." It provides for the constitutional "valuation," and does not go counter to the law of congress.

The complainants fail to show that any act of injustice is about to be done to them. They do not show anything that affects the substantial justice of the tax they seek to enjoin.

The injunction asked for in each case is denied.

(*Superior Court of Cook County.*)

**The People of the State of Illinois ex rel. William Bowers,
alias William Smith,**

vs.

Thomas E. Barrett, Sheriff of Cook County.

(1905.)

1. **EXTRADITION—REVIEW BY COURT OF PROCEEDINGS.** The court has jurisdiction in an habeas corpus proceeding to enquire whether the relator has been properly charged with a crime in the demanding state and whether the papers are properly authenticated. The governor's decision is not final but is subject to review by the courts.
2. **SAME—DISCRETION OF GOVERNOR.** The governor has the right to refuse a warrant of extradition for any reason whether he doubts the good faith of the prosecution or even if he believes that the defendant will not receive a fair trial. There is no power in the courts to compel him to act.
3. **SAME—RIGHT OF COURT TO DETERMINE QUESTION OF FACT AS TO WHETHER DEFENDANT IS A FUGITIVE FROM JUSTICE—GOVERNOR'S WARRANT AS EVIDENCE.** The court is bound in a habeas corpus

proceeding to determine the question of fact as to whether or not the relator is a fugitive from justice. The governor's warrant is *prima facie* evidence of this fact and the burden is upon the relator to overcome the presumption arising from its issuance, but the relator is entitled to his discharge if he can show that he was not physically present in the demanding state.

Petition for writ of habeas corpus. Cause heard on writ issued by Judge Willard M. McEwen, with Judge John Gibbons sitting as associate.

Julius Limbach, attorney for relator.

F. L. Barnett, attorney for respondent.

PER CURIAM:—

This cause comes on to be heard on the petition of the relator, William Bowers, for a writ of habeas corpus, the return of Thomas E. Barrett, sheriff, and a replication of relator to said return. The relator is held in custody by virtue of a writ charging him with being a fugitive from justice, issued on complaint before a justice of the peace, and also upon an extradition warrant issued by Hon. Charles S. Deneen, governor, involving the same charge, upon requisition of the governor of the state of New York.

By the pleadings there is sought to be raised by relator the issue of whether or not he was or is a fugitive on the charge mentioned in the extradition proceedings from the state of New York. It appears that an indictment is pending in the county court of the county of Kings, returned by grand jury, entitled "The People of the state of New York against Frank Brown, etc., and George Whitney, alias William Smith, alias Butch Smith," charging the defendants therein with having, on the 24th day of November, A. D. 1905, burglarized the dwelling house of William J. Laroche, in said county of Kings. And it is upon this charge that relator is sought to be extradited. There is no question or dispute before the court, and it is conceded, that the burglary in question was committed on the date charged in the said indictment, but the relator contends that he was not in the state of New York at

or about the time of the said November 24th, 1905, nor at any time during said month of November, and that he was not an accessory to said crime, nor was he in the state of New York at any time when he could have been a party to the crime charged, and is not in fact a fugitive from the justice of the state of New York.

There arises, therefore, the questions: 1st. As a matter of law, has the superior court of Cook county jurisdiction to inquire into and settle the question of fact in an extradition case, whether or not the relator is a fugitive from justice, and, 2nd. If it has such jurisdiction, what weight of evidence is required? 3rd. Is the relator in fact such fugitive?

WHAT IS THE JURISDICTION OF THE COURT.

The argument is made on behalf of the sheriff, that, because the relator necessarily on such an issue, proves, an alibi, therefore it amounts to making a defense in these proceedings which ought to be made in the state of New York. There is some support in this contention based upon the authority of several cases which adopts this as an argument or reason why a court will not entertain this inquiry and treats the governor's warrant as conclusive. As a matter of principle it does not seem to us that this is a real test. If the constitution of the United States, and the federal statutes, grant the authority to the court to settle this question of fact, then the incident that an alibi and complete defense is shown cannot destroy the authority conferred. In other words, the test is to be found in the power created by the constitution and the federal statutes and not in the consequence of procedure in the court.

The constitution of the United States, article 4, section 2, clause 2, provides as follows: "A person charged in any state with treason, felony or any other crime, who shall flee from justice and be found in another state, shall on demand of the executive authority of the state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime."

In order to execute this section of the constitution, congress enacted the following (section 527, Rev. Stat.): "Whenever the executive authority of any state or territory demands any person as a fugitive from justice of the executive authority of any state or territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any state or territory, charging the person demanded for having committed treason, felony or other crime, certified as authentic by the governor or chief magistrate of the state or territory from whence the person so charged has fled, it shall be the duty of the executive authority of the state or territory to which such person has fled, to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear. * * *

There seems to be no difference among the several courts that the question of whether a relator has been properly charged with a crime in the demanding state, and whether the papers are properly authenticated, and any question of law arising on the face of the paper, may be submitted to the courts to determine the right to extradite. The governor's decision upon such a question of law involved has no finality and is subject to review by the courts. The right seems to be conceded to the governor to refuse his warrant, as a matter of discretion, for any reason, whether he doubts the good faith of the prosecution or even if he considers that defendant sought to be extradited will not receive a fair trial in the court in which he is charged, and there is no power in the courts to compel action by the governor, regardless of the motives or reasons which inspired his refusal to act.

The constitution contemplates that a person shall be "charged" in one state, and that he "shall flee from justice and be found in another state," and then the executive "shall give him up on demand." If the executive has not the final right to determine whether the person demanded is charged legally, it would seem that he had no more of a right to

finally determine that the person charged was in the other state and fled from its justice. The circumstance that the former is a question of law and the latter a question of fact, does not change the principle. If the individual arrested upon a governor's warrant has a right (1) to be legally charged with a crime, and (2) to be adjudged a fugitive from the demanding state, then it is as much his privilege to appeal to the court in one instance as the other. The statute does not make the governor a judicial officer to determine conclusively the sufficiency of the requisition proceedings. When the demand is made reciting that a person is charged and that he is a fugitive, it becomes his duty to issue an extradition warrant for his arrest and transfer for trial. But in doing so his act is purely executive—purely ministerial. And that a person seized upon a warrant, to be carried away from his home and perhaps his witnesses and means of defense to a foreign jurisdiction, cannot appeal to the court for a determination of the essentials to his extradition, is to leave him without power to make a contest of fact or law upon anything which the governor or officials of the demanding state may represent. To the extent of depriving him of his liberty until he came under the force of the mittimus of the court in which he is charged, he would be deprived of his liberty without due process of law. It may be said that a party has the right to a trial before the governor. There is nothing in the law which says that he may, and it rests entirely in the discretion of the governor whether he will issue his warrant, with or without trial, or not. As a matter of practice, in the great majority of cases, no hearing or notice of hearing is ever given to the person involved. If the governor has the right arbitrarily to refuse his warrant, then he has the same power to arbitrarily issue such warrant upon any showing which he pronounces sufficient. The governor is presumed to have issued the requisition in discharge of his official duty. There are no presumptions against the *bona fides* of his act. His warrant when issued is of the same character as any other warrant which demands the seizure of the person. Its authority depends upon the law and the representations to the issuing power, and where no direct method

is provided by law for the testing of the sufficiency of the warrant, it is very clear that every court with jurisdiction in habeas corpus proceedings may inquire into the legality of a detention.

The habeas corpus act of this state provides that cause of detention may be inquired into, recites specific instances where the relator may be discharged and provides that a prisoner shall not be discharged, if he is in custody, among other causes, "for any treason, felony or other crime committed in any other state or territory of the United States, *for which such prisoner ought, by the constitution and laws of the United States, to be delivered up to the executive power of such state or territory.*" By implication this act contemplates that the court will issue its writ to inquire into causes of this nature, and if the court has the power to issue the writ, which is clear, how is it going to determine whether the prisoner "ought by the constitution and laws of the United States" to be delivered up, unless it determine the essentials of extradition, viz., is he legally charged by the demanding state, and has he fled from the justice of that state?

As a matter of authority, the several courts of the different states have disagreed on the right to inquire into the question of fact of the relator being a fugitive. We shall not attempt to distinguish these cases as they are in irreconcilable conflict. The supreme court of Illinois has never determined the question. The decision cited in the brief of the sheriff of a recent case, number 4614, *People ex rel John McNichols v. Thomas Barrett, Sheriff*, in an oral opinion, holds that the governor's warrant in the case involved was issued upon a sufficient affidavit, and does not attempt to decide the question involved here. Counsel for the sheriff contends that in effect, on the facts in the particular case, the supreme court did decide adversely to relator's contention, but conceding that a showing was made in the McNichols case before the supreme court, disputing that he was a fugitive from justice, we can not say but what the supreme court held evidence insufficient rather than adjudging that the subject was not open to inquiry.

The language of the first clause of exceptions affords an

argument by comparison. It says he shall not be discharged if he is held by any process by any court or judge of the United States. No discretion is given to inquire into the process and determine if he "ought" to be remanded. Jurisdiction is denied by implication just as it is given in the extradition clause where the court decides whether the relator "ought" to be given up.

The authority of the federal courts, as we view it, however, appears to be almost entirely in favor of the right to make an inquiry as to this disputed question. All the power exercised in extradition matters is by virtue of the constitution and the statute. As is said in *Ex parte Morgan*, 20 Fed. 298: "In a case of this kind the chief executive of the state can not act on the ground of public policy. His power and his only power to extradite a prisoner from his state must be found in the statute and law of the United States, and if it is not there it does not exist. Not only the power, but the manner of its exercise is based exclusively on the constitution of the United States and the law of congress passed in pursuance thereof. Interstate extradition is regulated by law. No such power can ever be exercised by the chief executive of the state on the ground of comity. (Rorer, *Inter-State Law*, 225.) Nor has it ever been in this country properly and legally exercised on such ground."

That the federal courts hold that the question is open to judicial inquiry, is stated in *In re Cook*, 49 Fed. 833, 839. "It is essential, to comply with such executive demand, that the prisoner whose surrender is demanded, should be adjudged a fugitive from justice of the demanding state. The decision of the executive is not conclusive of that fact, and so we are of opinion that the action of the executive is reviewable by federal tribunals, and that it is competent for the court to determine whether or not in fact the demanded prisoner is a fugitive from justice."

To the same effect is the decision of the supreme court of the United States, in *Roberts v. Reilly*, 116 U. S. 95, on the legal requirement considered the court say: "It must appear, therefore, to the governor of the state to whom such a

demand is presented, before he can lawfully comply with it, first, that the person demanded is sufficiently charged with the crime against the laws of the state from whose jurisdiction he is alleged to have fled, by an indictment or an affidavit certified to as authentic by the governor of the state making the demand, and second, that the person demanded is a fugitive from the justice of the state the executive authority of which makes the demand."

Other federal authorities which seem to bear this out, are: *Ex parte Hart*, 10 Am. Crim. Rep. 308, 63 Fed. 249; *Ex parte Joseph Smith*, 3 McLean, 121, 22 Fed. Cas. 373; *Roberts v. Reilly*, 116 U. S. 80; *Hyatt v. People ex rel. Corkran*, 188 U. S. 691.

It is contended by counsel for the sheriff that the latter case is not an authority to support the view, and that inferentially it is to the contrary. The justice pronouncing the decision in that case refers to the possibility of a court refusing to review, in the following language: "If, upon a question of fact made before the governor, which he ought to decide, there was evidence pro and con, the courts might not be justified in reviewing the decision of the governor upon such question. In a case like that, where there was some evidence sustaining the finding, the courts might regard the decision of the governor as conclusive." There is no contention that there was any evidence offered pro and con before the governor in the case at bar. Then the court goes on to say: "But here, as we have the testimony of the relator (without contradiction) and the stipulation of the counsel as to what the facts were, we have the right and it is our duty on such proof and concession, to say whether a case was made out within the federal statute justifying the action of the governor. It is upon the statute that the inquiry must rest."

In effect the supreme court holds that it is conclusively shown that relator was not physically present in the demanding state, and that therefore the governor's warrant could be reviewed by the court. and held void. If the court had any jurisdiction whatever to consider the weight of relator's evi-

dence, and a stipulation of facts, then it would have the same jurisdiction in another case where such evidence might have been in a less high degree.

In conclusion the court says: "We are of opinion that, as the relator showed, without contradiction upon conceded facts, that he was not within the state of Tennessee at the times stated in the indictments found in court, nor at any time, when the acts were, if ever, committed, he was not a fugitive from justice within the meaning of the federal statute upon that subject, and upon these facts the warrant of the governor of the state of New York was improperly issued. The judgment of the court of appeals, of the state of New York, discharging the relator from imprisonment by reason of such warrant must be affirmed."

Some cases seem to draw distinction between the powers of the federal courts and of the state courts to review this disputed question of fact. There is no difference in principle. The finding of the governor is no more binding on one than on the other. *Ex parte Reggel*, 116 U. S. 642; S. C. 5 Am. Cr. Rep. 218 and note; *Robb v. Connelly*, 111 U. S. 624. The extradition statute does not make any provision regarding courts and their jurisdiction to review. It is necessary, therefore, to go to the general principles of jurisdiction regarding the protection of personal liberty, and both the state and Federal courts in settling the question have to examine into their inherent jurisdiction in the particular case considered. The jurisdiction in habeas corpus matters in Illinois, is of the fullest and most sweeping kind. It is made the duty of every judge in the state upon whom the jurisdiction is conferred, to examine under a penalty into complaints against restrictions upon personal liberty. And so jealous has been the policy of the law in that regard, that no appeal is permitted in habeas corpus cases, and each judge is made free and independent of review or question by a court of appeal. So fixed is this policy that legislators have repeatedly refused, although strongly urged, to pass a law granting such appeals. It becomes, therefore, in every instance a matter for the judgment and conscience of the particular judge who entertains the proceedings.

After an examination of all the authorities presented on both sides, we are forced to the conclusion that both as a matter of principle, and on the best authority, this court is bound to examine into the question of fact.

And we believe the true rule to be that the governor's warrant is *prima facie* evidence, and that the burden is upon the relator to overcome the presumption arising from its issuance, and that the relator, if he can demonstrate by satisfactory evidence that he was not physically present in the demanding state, is entitled to be relieved from the force of the warrant.

THE EVIDENCE ADDUCED.

In further support of the governor's warrant, Josephine Gallagher was sworn and examined as a witness. She testified to the circumstances of the alleged burglary and identified the relator as having been on the porch of Laroche on the evening of the 23rd of November, 1905, at about 6:30 o'clock; that she saw him through the window and held a short conversation with him; that there was an electric light on the street. In her description of the man she saw, she states that he was inclined to be dark and rather rough looking (relator is light); that about the same time on the evening following, she saw the same man again on the porch. She then testified that she had an interview on the 24th and not on the 23rd. She states that she had not seen the man since coming from New York, at the time she testified, but later changed her testimony and said that she had seen him in the court room that morning. The burglary occurred at 7:30. On cross-examination she stated that she saw relator through the lace curtain, and through the windows. This seems to be the testimony on which the indictment was procured against relator in New York.

Opposed to this testimony was the evidence of several witnesses. Dr. H. S. Warren was called, and testified that he was family physician of the relator and had treated both relator and members of his family. That on three or four occasions about November 24th, and on that date he had dressed relator's hand for a wound in the center of the hand. At

the time of the hearing, December 23rd, relator exhibited a partially healed wound. The doctor's time book showed a call on November 24th. The weight of the evidence is considerably lessened by the careless manner in which the book appears to have been kept and posted. There is nothing, however, to indicate any lack of reputability of the physician, or that he had any motive in swearing falsely concerning the entries in his book.

A witness, John J. McLaughlin, residing at 1551 Monroe street, was introduced on behalf of relator and testified that he had since about the first of last October been engaged as a repairer and painter of lamp posts under a contract with the city of Chicago; that relator was in his employ and received a salary of twenty-five dollars (\$25) a week as an inspector, principally, to follow up the work of the men and report on the same. That on Saturday, the 25th of November, at Graham's bank, at 134 Madison street, he paid relator his weekly wages of \$25. He recalls that he saw him also on the day previous. In connection with his testimony McLaughlin produced his book of entries concerning the painting contract. This book has every evidence of being a genuine book and kept from week to week, and shows that relator by the name of William Bowers, received his weekly salary for the entire period including the payment on November 25th. His time books and pay rolls of the work of the men employed tally with the book, apparently, in every particular, and if his testimony be taken as true, and that about Saturday noon, of the 25th day of November, he made the payment, it is impossible that relator could have been in the city of New York on Friday evening at 6:30 or 7:30 o'clock. Of McLaughlin it may also be said that there is nothing in his testimony or in the circumstances surrounding him to cast suspicion or doubt upon him or his story. He appears to have held political position prior to engaging upon this contract, but nothing has been offered in any way to impeach him.

Another witness, William Skidmore, engaged in the restaurant and saloon business on West Madison street, testifies that on the 24th day of November, 1905, he loaned to relator

the sum of \$15, that one Patrick J. King was in his place and that at his request, he, Skidmore, loaned Bowers \$15, and King \$10. It was the custom of Skidmore, in making small loans or disbursements of this kind, to make a pencil memorandum on a slip and later to transfer the same to the small account book, and in the evening, on the closing of his place and checking up cash with the cash register, to use another book showing the cash register footings and footings from these slips, for the purpose of making up the cash of the day. There appears upon the memorandum of petty cash, a loan, "Butch, W. R. Skid. \$15.00." Before the word "Butch" appears a check mark which it was usual to make on checking the cash up with the cash register. The footings of the day appear on the book used for that purpose in regular order, among other entries, without alterations, and correspond with the entries in the petty cash. As the word "Butch" is written in the check column to the left, the check mark before the name is a strong circumstance, taken in connection with the other check marks which appear in the center of that column, corroborating the contention of realtor that the word was written in on the 24th day of November. The testimony of Skidmore, in connection with his books and entries, is strongly in favor of the conclusion that the transaction occurred as related. Skidmore is corroborated as to the circumstance by Mr. King.

It further appears by the testimony of witnesses, and the station sheets of the Des Plaines street station that Bowers was charged with an assault, and that a warrant was pending for him and on Monday the 27th day of November, he appeared and gave bail and afterwards on hearing was discharged. There was some other testimony of a non-conclusive kind, which we do not deem important.

After considering all the evidence and examining at great length the witnesses and recalling them for further examination, placing in the scales on the one hand the testimony of Miss Gallagher, which seems of a doubtful kind against the testimony corroborated by books, and especially the books and papers of McLaughlin, we feel compelled to hold that the

relator has clearly established by evidence beyond a reasonable doubt, that he was not in the state of New York at the time of the commission of the burglary, and that he was not and is not a fugitive from justice on such charge, from the state of New York. Holding as we do, it follows that the relator is entitled to his discharge, and that will be the order. Relator discharged.

(Superior Court of Cook County. In Chancery.)

Standard Glass Company, et al.

vs.

Chicago Telephone Company.

(May 29, 1907.)

1. **TELEPHONE COMPANIES—RIGHT OF SUBSCRIBER TO ATTACH EXTENSIONS TO TELEPHONE.** A provision in a contract between a telephone company and its subscriber that the subscriber shall not attach to the telephone company's wires any equipment or apparatus not furnished by such company, is a valid regulation and the subscriber is not justified in installing his own equipment.
2. **MULTIFARIOUSNESS—JOINDER OF PARTIES AS COMPLAINANTS.** To permit a number of different parties having separate interests to join there must be a unity of principle, a unity of questions involved and such a unity of facts that there is practically nothing for the court to do but to determine one set of facts.

Bill for injunction. Heard before Judge Willard M. McEwen.

Statement of Facts.

The bill was filed by a large number of telephone subscribers having contracts with the defendant telephone company containing a provision as follows:

'The lessee agrees not to make, permit or use any electrical or mechanical connections, contrivances or apparatus with the lines, instruments or equipment furnished by the lessor, without the consent of the lessors.'" The bill alleged that

defendant refused to furnish extension telephones at reasonable rates and that accordingly the complainants had purchased their own extension wires and instruments and had connected the same with the lines and wires of the defendant company; that such company was threatening to terminate the contracts of complainants and to deprive them of telephone service on account of the violation of the covenant in question, which covenant was alleged to be unreasonable and void. *Ex parte* injunctions were issued.

Beach & Beach and *Smoot & Eyer*, for complainants and intervening petitioners.

Holt, Wheeler & Sidley, for defendant.

McEWEN, J., (orally). I don't think it is necessary to state the questions involved arising upon the contract, because the particular question here is of the matter of extensions which are claimed to be violations of the contract. I have been greatly interested in the question of fact, whether extensions were reasonable things in the nature of attachments to facilitate the use of the telephone in the office or place of the subscribers. I am inclined to the view that upon the showing made here they are such additions to the telephone that the company has the right to insist that it may supervise the putting in of those extensions and control them in the same manner that it does all the rest of the telephones and that the clause in the contract is not unreasonable or illegal.

But there is a further question in the case which has impressed me, which I think goes to the right of the parties to maintain the case at all, and that is the question of the right of the complainants to join in this proceeding. That point was very carefully and fully argued and the growth of the law in that particular shown by the different cases. I think that the gist of them all, as applied in the present time, is that for different parties having separate interests to join, there must be a unity of principle, a unity of question involved and such a unity of facts as that there is practically nothing for the court to do but to determine one set of facts.

Now, in this case there is a unity of principle, there is the same question of the validity of this clause of the contract; but as to the extensions there is a separate inquiry for each extension as to its quality and its manner of putting in and its effect upon the telephone and its effect upon the system generally. So that I think the cause cannot be maintained by these several complainants, and it follows, therefore, that the intervening petition cannot be permitted. The injunctions will be dissolved and all the proceedings dismissed, intervening petition and original petition.

In the Mason and Wyman case the ruling will be the same.

NOTE.

For a case similar to the above see *Beach et al. v. Chicago Telephone Company*, 1 Ill. C. C. 158, which is pending on appeal in the appellate court of Illinois. Upon the right of several complainants to join in one proceeding, see *Chicago Telephone Company v. Illinois Manufacturers' Association*, 106 Ill. App. 54; *City of Chicago v. Collins*, 175 Ill. 445.—Ed.

(Criminal Court of Cook County.)

People of the State of Illinois

vs.

Harry Boer.

(July 10, 1901.)

1. LARCENY—INDICTMENT, SUFFICIENCY OF INSTRUCTION. An instruction in a trial, under an indictment for larceny of water from a city which informs the jury that "the taking of water from a city main, without a permit so to do, with intent to use the same without paying therefor constitutes larceny of whatever quantity is so taken," is bad because it omits the "felonious intent" necessary to constitute the crime of larceny.
2. CRIMINAL LAW—RIGHTS OF DEFENDANT—INSTRUCTIONS. A defendant has a right in all cases to insist that the jury be instructed that they must find all the constituents of the crime to exist, and it is no answer to say that although an instruction does not state the law correctly, the evidence shows that the de-

- defendant is guilty. It is the right of the defendant to demand that he be legally convicted.
3. **SAME—ERRONEOUS INSTRUCTIONS, EFFECT OF.** Where proof of guilt is clear, an erroneous instruction will not be a ground of reversal unless it appears that the jury may have been misled by such erroneous instruction.
 4. **INSTRUCTION BY STATE AS TO NECESSITY OF PROVING EVERY CIRCUMSTANCE RELIED UPON.** An instruction that it is not necessary for the state to prove every circumstance relied upon to show the guilt of the defendant, but that it is sufficient, if, upon considering all the evidence, the jury believe the defendant guilty, *held* erroneous in any case where circumstantial evidence is relied upon.
 5. **CRIMINAL LAW—PRESUMPTION OF INNOCENCE.** Strong suspicion or strong probabilities of guilt are not sufficient to overcome the presumption of innocence with which the law clothes every defendant.
 6. **INDICTMENT FOR LARCENY OF WATER FROM A CITY WATER MAIN—NEW TRIAL.** The defendant was indicted and tried for larceny of water from a city. Upon a motion for new trial it appearing that erroneous instructions had been given to the jury, and the proof of defendant's guilt not being clear upon a review of the evidence it was *held* that a new trial must be granted.

Indictment for larceny of water from the city. Motion for a new trial. Heard before Judge Murray F. Tuley, July 10, 1901, criminal court of Cook county. The facts are stated in the opinion.

TULEY, J.:—

In this case two written instructions were asked by the state's attorney, together with a number of general printed or stock instructions. The two written instructions, in substance, inform the jury, "That the taking of water from a city main, without a permit so to do, with intent to use the same without paying therefor, constitutes larceny of whatever quantity is so taken." The state's attorney concedes that both such instructions are bad, because they omit the "felonious intent" which is necessary to constitute the crime of larceny.

The statute defines larceny to be the *stealing*, taking and carrying away, etc., of the property of another. There could

be no stealing unless there be a "felonious intent" in the taking and carrying away. The state, in its numerous printed instructions, omitted to ask for one defining larceny, which is always asked for and given in larceny cases. This omission was not noticed by the court. If such instruction had been asked and given to the jury, the defect in the two written instructions would have been obviated.

There is no instruction among the many given which tells the jury that there must be a "felonious intent" in the taking and carrying away of the water. A defendant has the right in all cases to insist that the jury be instructed that they must find all the constituents of the crime to exist, and it is no answer to say that although an instruction does not state the law correctly, the evidence shows that the defendant is guilty. It is the right of the defendant to demand that he be legally convicted. There are decisions of the supreme court to the effect that where the proof of guilt is clear, an erroneous instruction will not be a ground of reversal unless it appears that the jury may have been misled by such erroneous instruction. I have carefully read the entire testimony given in this case to see if the guilt of the defendant is clearly shown, and I have arrived at the conclusion that it is not, and also that there is grave doubt whether the evidence is legally sufficient to maintain a verdict of guilty. It is, when read in cold type, not as strong against the defendant as I supposed it to be at the time of the trial.

In 1898 a four-inch water pipe was laid from a corner of the premises of the Continental Packing Company, for a distance of about five hundred feet into the company's pump house. At the corner referred to it connected with a pipe upon adjoining premises, which connected with the city water main in the public street. No water meter was attached to said pipe. When the pipe on the adjoining premises and the connection with the main was made, does not appear. The pipe was laid by two men working after hours, and as late as 12 a. m. at night for one week. One of the men, Beauchamp, was a witness; he testified that the defendant Boer one day told him that the engineer wanted to see him about

laying some pipe, and after that he laid some pipe under the direction of the engineer other than the pipe in question and sometime after laid the pipe in question by the direction of the engineer. He received his orders from the engineer, and did not see the defendant Boer about at any time while the pipe was being laid.

There is no sufficient evidence to show that the defendant ever knew that this pipe was laid or was being laid, or that he ever knew of any water passing through this pipe, or that he directed or advised in regard to the same in any way. Nor is there any direct evidence that any water ever passed through this pipe, or that any pump was ever connected with the pipe.

The city, in September, 1900, was engaged in looking for bogus pipe in that vicinity for two or three days prior to discovering the connection of the four-inch pipe in question, with the city water main in the public street. The city workmen then traced the pipe to and under the company's old ice house, which stood at the corner where the pipe connecting with the main entered the company's premises. They there found that under the floor of the ice house the pipe had been broken, the break indicating that it had been very recently broken, and at the company's pump house, the four-inch pipe on the inside of the wall appeared to have been recently broken off just under one of the pumps. There was some water found in the four-inch pipe when it was uncovered at various places, but there was a shut-off in the pipe just outside the company's premises, and there is no evidence to show it was ever opened, or if opened, when it was closed, nor was there any evidence that the water found in the pipe was water from the city main.

In the absence of proof that the company ever used water through this pipe, it cannot be inferred that the water found in the pipe was necessarily from the city main. While the evidence raised a strong suspicion that the company did use water through the pipe, there is no evidence connecting the defendant with such use or tending to show that he knew of such use. The evidence shows that he was, "the superin-

tendent of the packing house," but does not show what were his duties as such superintendent, or that he had any control over the engineer who directed the laying of the pipe or over the pump house referred to in the evidence.

The city presented a bill against the Continental Company, of some \$29,000 for water claimed to have been used during some three years previous through the four-inch pipe. Conferences took place between one Goodwin, who appeared to act in the interests of the company, and the city officials. At one of these conferences the assistant corporation counsel, Mr. Nourse, the head of the city water department, and the defendant Boer were present. The object was to arrive at a settlement of the claim of the city. I have carefully read the evidence as to what took place at this conference, and also as to the conversations that took place subsequently at the pump house wherein the defendant took part. I fail to find any admission by the defendant that any water had been used to his knowledge, coming through the pipe. It was expressly said that Mr. Boer was present to give any information that he possessed in regard to the matter, and did give some information as to the length of time the engineer had been in the employ of the company, the capacity of the pumps and as to the time they usually ran. Two or three times in the conferences at which he was present, Boer, it appears, declared that he "had nothing to do with the pipe" in question, and he did not admit that any water ever was used through this pipe by the company. On the contrary, he "did not believe a drop of water had ever been used." I fail to find any evidence in the conversations referred to or in conversations testified to by Nourse with the defendant Boer, that he made any admission implicating himself as directing or knowing of the laying of the pipe, or the use of water through the same.

The assistant corporation counsel, by judiciously made threats to cut off all water connection with the packing company's premises, succeeded in compelling the packing company to pay \$6,000 for water claimed to have been illegally used. It also appears in the evidence that there were two

meters connected with authorized pipes running into the packing company's plant and that the meter readings for some six days after the uncovering of the four-inch pipe (which was the 13th of September, 1900), showed an increase of water used each day of from ten to twenty-nine thousand gallons and an increase above the former daily average of about twenty-three thousand gallons, but there were two artesian wells (that had pipes running into the same well where this four-inch pipe led into) which were sometimes used and sometimes out of use and the evidence failed to show whether water from these two artesian wells, or either of them, was used during the time of this "increase" of the use of water.

I am inclined to think that the evidence that the packing company paid some six thousand dollars for water claimed by the city to have been used through the pipe in question, may have influenced the jury in their verdict, notwithstanding the fact that the court ruled out such evidence upon its subsequently appearing during the trial that the payment of the \$6,000 was a forced payment and was made because of threats made by the assistant corporation counsel to have the city water cut off from the company's plant if that amount was not immediately paid. The state, it is clear, has been much hampered in obtaining evidence as to what took place upon the company's premises, and by reason of its failure to find the parties who could testify to the same, but it does not appear that the defendant is responsible therefor. If the company did steal any water from the city, the defendant should not suffer for the same merely because he was superintendent of the packing house with no evidence as to what were his duties or powers as such, unless it is shown that he ordered the laying of the four-inch pipe, or ordered the use of the water through the same, or in some way aided, abetted or advised the laying of the pipe or the stealing of the water. Strong suspicion or strong probabilities of guilt are not sufficient to overcome the presumption of innocence with which the law clothes every defendant.

The motion for new trial must be granted.

I will say in addition that in my opinion the printed stock instruction to the effect that it is not necessary for the state to prove every circumstance relied upon to show the guilt of the defendant, but that it is sufficient, if, upon considering all the evidence, the jury believe the defendant guilty, is not good law in any case like the present where circumstantial evidence alone is relied upon.

(Criminal Court of Cook County.)

The People of the State of Illinois

vs.

John Stark, et al.

(February, 1904.)

1. **ARREST WITHOUT WARRANT.** To justify an arrest without a warrant the offense must be committed in the presence of the officer making the arrest.
2. **PERSONAL LIBERTY—DEFINED.** Personal liberty consists of freedom from physical and personal restraint; the right to the pursuit of happiness; to go where one chooses and to pursue such lawful occupations as may seem suitable. In its broad sense it includes freedom from unlawful arrest and restraint and from unlawful searches and seizures.
3. **ARREST—SEARCH FOR DEADLY WEAPON.** As incidental to an arrest an officer may search the person arrested for a deadly weapon, but not otherwise.

Indictment for assault and battery. Heard before Judge Jesse Holdom.

For statement of facts see opinion.

Robert N. Holt, assistant state's attorney, for the people.
W. P. Thornton, for defendants.

HOLDOM, J.:—

The defendants, police officers of the city of Chicago, stand indicted by the grand jury of this county for an assault and battery. The undisputed facts alleged to constitute the crime

stated briefly are that one Muff at midnight complained to the defendants that the prosecuting witness, a vender of fruit at a stand in front of his store, had, during a dispute then immediately preceding the complaint, as to the weight of some grapes which Muff, had purchased, drawn a revolver upon the said Muff; thereupon the defendants proceeded to the fruit stand and against the protest of the prosecuting witness forcibly and against his will searched the pockets of his clothing for the alleged revolver and finding none, released him—no arrest being made. In the struggle the clothing of the prosecuting witness was disarranged and some slight scratches inflicted upon his person. Defendants seek to justify their conduct, contending that they simply discharged their duty as police officers under the law, and in support of such contention cite sec. 1996 of the municipal code, which is as follows: "Any policeman of the city of Chicago may, within the limits of said city, without a warrant, arrest any person or persons whom such policeman may find in the act of carrying or wearing under their clothes or concealed about their person, any deadly weapon of the character in this article specified, or any other dangerous or deadly weapon." Counsel for defendants further rely upon *North v. The People*, 139 Ill. 81, as justification for the acts complained of. It is apparent from what will hereafter appear that neither the ordinance nor the *North Case* justify the conduct of the officers.

It is axiomatic and a fundamental principle of the common law, and the same principle stands engrafted into the federal and state constitutions and the statutes of most of the states of the union, that to justify an arrest without a warrant the offense must be committed in the presence of the officer or the person making the arrest.

The constitutions of this state and of the United States provide "that the right of the people to be secure in their persons, homes, papers and effects against unreasonable searches and seizures shall not be violated." Art. IV, 1st Amendment to Constitution of the United States; Constitution of Illinois, sec. 6, art. II.

Personal liberty has been judicially defined as freedom from physical and personal restraint; the right to the pursuit of happiness; freedom to go where one chooses and to pursue such lawful occupations as may seem suitable; and in its broad sense it includes freedom from unlawful arrest and restraint, from unlawful seizures and searches, from assault and battery, etc. *Munn v. Illinois*, 94 U. S. 113; *People v. Gillson*, 4 Am. St. Rep. 465; *Slaughter House Cases*, 16 Wall. 36; *Butcher's Union Co. v. Crescent City Co.*, 111 U. S. 746; *People v. Marx*, 99 N. Y. 377; *In Matter of Jacobs*, 50 Am. Rep. 636.

These principles are forcefully sustained and upheld both by reason and authority in *North v. The People*, *supra*, where they properly arose, and were questions in the case presented for decision; for other errors the sentence of death by the *nisi prius* court imposed upon North was reversed. The court said on page 104: "The arrest or attempted arrest here was without a warrant. It is provided by sec. 4, div. 6 of the criminal code, that 'an arrest may be made by an officer or by a private person without warrant, for a criminal offense, committed or attempted in his presence, and by an officer when a criminal offense has in fact been committed and he has reasonable ground for believing that the person to be arrested has committed it.' The seventh section of the same division is that 'When an arrest is made without a warrant, either by an officer or a private person, the person arrested shall, without unnecessary delay, be taken before the nearest magistrate in the county, who will hear the case for examination, and the prisoner shall be dealt with as in cases of arrest upon warrant.'"

Sec. 2 of art. 6 of the state constitution provides, "No warrant shall issue without probable cause supported by affidavit, particularly describing the place to be searched and the person or thing to be seized," and "No person shall be deprived of life, liberty, or property, without due process of law;" and on page 105, *supra*, the court said, "Under like restrictions in the constitution it has been held, in some states, that arrests shall not be made without a warrant ex-

cept for felonies and for breaches of the peace committed in the presence of the officer arresting (*Pinkerton v. Verberg*, 78 Mich. 573; *In re May*, 41 Mich. 299; *State v. Hunter*, 106 N. C. 796), while in other states it seems to have been held under the same constitutional restrictions, that arrests may be made for misdemeanors generally, committed in the presence of the officer making the arrest. *White v. Kent*, 11 Ohio St. 550; *Thompson v. State*, 30 Ga. 430." Under neither of which constructions would the acts of the defendants be lawful. If they had arrested the prosecuting witness upon the complaint of Muff that a crime had been committed and taken him before the nearest magistrate for examination, as provided by the statute, another and different question would arise; but under no circumstances could they take cognizance of the alleged infraction of the law, search the accused person, and then, after a scuffle brought about by his resistance, adjudge him not guilty and release their hold upon him. And it would seem there could be no justification for their conduct when it is borne in mind that he was a citizen settled in the community, pursuing his lawful avocation upon his own premises, the fruit stand being run in conjunction with the store before which it stood.

Had the officers arrested the prosecuting witness, then as incidental to the arrest they might have searched him for a deadly weapon; but as he was not under arrest his person was sacred from search for any purpose. 2 Hawkins' Pleas of the Crown, ch. 13, sec. 28; 3 Wharton, Criminal Law, sec. 2927 (7th ed.); *Spalding v. Preston*, 21 Vt. 9; *Clossom v. Morrison*, 47 N. H. 482.

Sec. 1996 of the municipal code, *supra*, must be construed in the light of the constitution and sections of the criminal code before referred to, and in so doing its legal effect and power is found to be environed and restricted to the right in a police officer to search a citizen for a deadly weapon only as an incident to an arrest for a breach of the peace or other criminal offense. Were the law otherwise, every citizen's person would be subject to search for concealed weapons at the whim or caprice of any police officer. To paraphrase

a saying of Lord Camden, "Such a condition would be worse than the Spanish Inquisition, a law under which no American would wish to live an hour."

On the facts as admitted by Stark and O'Brien they acted without warrant of law. Their acts constitute an assault and battery for which they stand indicted and of which they are found guilty. Believing that they thought they were at the time acting in consonance with a sanctioned custom of the police department, and that they were not actuated by malice, they will be punished by the infliction of a fine of five dollars each.

(Superior Court of Cook County. In Chancery.)

Leiter, et al.

vs.

Leiter, et al.

(1902.)

1. PROBATE COURTS—SALE OF REAL ESTATE TO PAY DEBTS. The probate court has jurisdiction to sell real estate in which the decedent had any claim or interest, for the purpose of paying debts although the decedent was not seized of title at the time of his death.
2. SAME—INTEREST OF HEIRS CUT OFF. Where real estate is sold to pay debts under an order of the probate court, the interest of the heirs in the premises sold is divested.
3. SAME—EFFECT OF DECREE ON RIGHTS OF JUDGMENT CREDITOR. A bill was filed to foreclose a mortgage, a receiver was appointed and a sale was had. During the period of redemption the mortgagor died and the interest of such mortgagor was sold to pay debts under a decree of the probate court. A judgment creditor was made a party to the probate court proceedings. The decree of sale in the probate court was made subject to the master's certificate of sale and the possession of the receiver. The judgment creditor thereafter intervened in the foreclosure suit and sought to subject the funds in the hands of the receiver to the payment of his judgment. *Held*, that such judgment creditor was bound by the decree of the probate court;

that he must look to the assets in course of administration in such court for a satisfaction of his claim; that he should have set up his claim in the probate court proceeding and his failure to do so estops him from asserting any claim paramount to that acquired by the purchaser under the probate court decree.

Bill to foreclose mortgage. Cross-bill of judgment of judgment creditor to subject funds in hands of receiver to payment of judgment. Order dismissing cross-bill. Motion to set aside same. Heard before Judge Jesse Holdom.

For statement of facts see opinion.

Albert N. & Edward P. Eastman, solicitors for defendant, Henry A. Eastman.

S. A. & W. G. French and *H. C. Noyes*, solicitors for cross-complainant.

HOLDOM, J.:—

This is a motion to set aside an order dismissing the cross-bill of David Rankin, seeking to subject the funds in the hands of the receiver of the premises foreclosed, to the payment of a judgment held by him as assignee against the mortgagor, T. Benton Leiter.

Subsequent to the sale of the mortgaged premises and during the period of redemption (T. Benton Leiter, mortgagor and judgment debtor, having died soon after the filing of the bill to foreclose) application was made under the statute, in the estate of Leiter, to sell his claim and interest to the mortgaged premises to pay debts established against his estate in excess of personalty, in which proceeding Rankin was made a party defendant and of whom the probate court acquired jurisdiction. The probate court had jurisdiction to order sold in due course of administration, to pay debts, any real estate in which deceased had any claim or interest, although not seized of title at the time of his death. *Stow v. Kimball*, 28 Ill. 93; *Cutter v. Thompson*, 51 Ill. 390.

In *Cutter v. Thompson*, 51 Ill. 390, the court said, page 392: "We do not believe it was the design of the legislature, by that act, to do anything more than to allow an adminis-

trator to apply for the sale of an estate which the intestate claimed, but of which he did not die seized."

In *Stow v. Kimball*, 28 Ill. 93, the interest sold was one derived under a contract of sale the conditions of which on the part of the intestate remained unperformed at the time of his decease.

Rankin proved his claim under the judgment held by him as such assignee against the estate of Leiter in the probate court, and it was allowed as of the seventh class.

A decree of sale was entered in the probate court, sale thereunder made to Henry A. Eastman and approved by that court, and a deed made and delivered to Eastman as such purchaser.

The decree of sale made three restrictions only: first, widow's dower; second, master's certificate of sale, and third, possession of receiver. Aside from these all the estate and claim of the Leiter heirs, including the equity of redemption, was divested at the sale under the decree and vested in the purchaser, Henry A. Eastman.

Rankin was bound by the decree of the probate court and for satisfaction of his claim under the judgment against Leiter he must now look to the assets of the Leiter estate in due course of administration in the probate court. Had he desired to preserve any lien which he claimed to the rents or other proceeds arising out of the mortgaged premises during the running of the period of redemption he should have set up his claim in the proceeding in the probate court, and have procured the sale there to be made subject thereto; failing so to do, he is now estopped from asserting any claim paramount to that acquired by Eastman under his deed as a purchaser at the sale under the decree of the probate court. The very thing sold under the probate court decree was the right of redemption vested in the heirs of Leiter and subject to be divested by decree of sale to pay the debts of their ancestor. By this sale, made under decree of the probate court, all the estate and claim of the heirs of Leiter to the mortgaged premises was effectually cut off and divested. Rankin is bound by that decree.

In *Bowers v. Block*, 129 Ill. 424, the court said, page 428: "It was said in *Harding v. LeMoyne*, 114 Ill. 65, that the object of making the parties named in the statute defendants, is for the purpose of enabling them to see that no injustice is done to those having claims against the estate and that the requirements of the statute are complied with. The authority given by the statute is to sell all real estate necessary for the payment of debts, to which the decedent had any 'claim or title. And it was said in the case last cited, 'If the paramount owner should happen to be joined as a defendant to the proceeding, it would doubtless be his duty to assert his rights to the property in his answer—not for the purpose, however, of forming an issue of that kind, to be tried in that proceeding, but for the purpose of giving notice of his right to prevent an estoppel.' "

This decision was rendered prior to the amendatory act of 1887, which gives to the probate court jurisdiction to settle all conflicting titles, adjust all liens and sell all interests.

Newell v. Montgomery, 129 Ill. 58, construing sec. 101, ch. 3, title Administration, made it incumbent upon the probate court to settle the equities and rights of all parties in such proceedings when adverse claims were made by the pleadings. In the light of sec. 101, *supra*, adverse title or interest set up by answer must be joined as an issue and tried in that proceeding.

Without deciding the propriety of the cross-bill of Rankin but for the sale under the decree of the probate court in the Leiter estate, or the relevancy of the case of *Ennis v. Wolff*, 194 Ill. 420, to the issues joined on the cross-bill of Rankin, I am of the opinion that as to Rankin's rights in the product of the equity of redemption being the moneys in the hands of the receiver, that the whole question as affecting any paramount claim he may have had is *res adjudicata* by reason of his failing to assert that claim, if any he had, in the probate court, in the proceeding to sell real estate to pay debts, in which he was a party, and in allowing that sale to be made freed from any prior claim or lien which he could have then asserted; to hold otherwise would be to adjudge that the pro-

bate court sale was abortive to pass any title, and a mere idle form.

The motion, therefore, to set aside the decree dismissing the cross-bill of Rankin for want of equity, is denied.

(Criminal Court of Cook County.)

People of the State of Illinois

vs.

Archer Carroll.

(1884.)

1. **SENTENCE—SUSPENSION OF.** There is no power in the court either under the statute or at common law to suspend the sentence of a prisoner found guilty by a jury.
2. **SAME—COMMON LAW RULE—REPRIEVES.** At common law the judges were empowered in capital cases to grant temporary reprieves but this power was only exercised in extreme cases.
3. **SAME—REVIEW OF ACTION OF CIRCUIT JUDGE IN SUSPENDING SENTENCE BY ANOTHER CIRCUIT JUDGE.** Where the trial judge suspends the sentence of a prisoner found guilty, this action is not subject to review by another circuit judge and the latter has no power to again sentence the prisoner.

Indictment for felony. Larceny. The facts are stated in the opinion.

TULEY, J.:—

The defendant Carroll was indicted for larceny in the year 1884. He was tried by a jury, found guilty and his term of imprisonment fixed at three years in the penitentiary. Sept. 30th, 1884, the then presiding judge of this court suspended the sentence and the prisoner was ordered discharged.

Motion is now made that the court now sentence the defendant to the penitentiary for the term of three years for the felony referred to. It is known that I differ with all, or nearly all of the judges who hold this court as to the power of a judge to suspend sentence upon a criminal who has been

tried by a jury, found guilty and had his term of imprisonment fixed by the verdict. In what I say I do not intend to criticise my brother judges. They are as conscientious as myself and their opinions entitled to as much credit.

Sec. 6 of division 14 of the criminal code requires that the jury shall in all cases "say in their verdict for what time the offender shall be confined" in the penitentiary and "the court in pronouncing sentence shall designate what portion of time the offender shall be confined to solitary imprisonment and what portion to hard labor."

I find no warrant in the statutes of this state for the exercise of the power to suspend the punishment fixed by the jury; no justification for a judge's failure to perform the duty enjoined upon him by the law. It is said, however, that the power exists by virtue of the common law. This I most emphatically deny. No case can be found where an English judge has ever suspended sentence for an indefinite period of time. Under a system of practice where the judge had no power to even grant a new trial in a case of felony, it would be strange indeed that the judges should undertake to say when the law should and when it should not be enforced. There was at common law what was known as the law of respite or reprieve, but even that appears to have been limited to capital cases. 1 Bishop, Crim. Law, sec. 1299. The same author says "the two terms are synonymous. Either signifies the suspension *for a time* of the execution of a sentence which has been pronounced."

"Every court which," says Hawkins, "has power to award execution may grant it of its own sentences." This latter sentence has been seized upon by some courts as holding that the court may suspend the execution of any sentence. It clearly has reference only to granting a respite or reprieve for a definite time in capital cases, as in no other was an "execution" of a sentence ever awarded. In all other cases the judges made only a memorandum upon the calendar or list of criminal cases as to the result, and the sheriff without any writ carried the sentence into execution.

These reprieves were granted only in extreme cases *ex*

necessitate, not depending upon the whim or caprice of the judge. An examination of the cases and of authors on criminal law will show they were granted where a woman condemned to death was found to be *enceinte*, where insanity had supervened and where there were extenuating circumstances in order to enable the prisoner to apply for a pardon.

"The judge should recommend the prisoner to a pardon and not suspend sentence in case he thinks no punishment should be inflicted." 1 Bishop, Crim. Law, sec. 675.

The law which allowed benefit of clergy and permitted approvers and accomplices to go unpunished has no bearing upon the point in question.

The reason why the judge has no such power is very clear to my mind. Says Archbold, p. 578: "A judgment though pronounced or awarded by the judges is not *their* determination and sentence, but the *sentence* and determination of the law which depends not upon the *arbitrary opinion* of the judge, but the settled and invariable principles of justice," and cites the form of the judgment which is not that "it is ordered" by the court, but that "it is considered, *consideratum est per curiam* which implies that the judgment is none of their own but the act of the law pronounced and declared by the court upon determination and inquiry."

In other words, the judge is not the law, but he is merely the instrument selected to pronounce the law of sentence and determination. Given the arbitrary power to say when the law shall and when it shall not be enforced, he has practically not only the judicial but the legislative and executive power combined in one person. It is judicial usurpation not only of the power of pardon, but also the power to say what shall be the law.

But it is claimed that the practice has prevailed in the United States, and I have been cited to a written opinion of the learned judge who suspended sentence in this case in which reference is made to the following American cases: *Commonwealth v. Dowdican's Bail*, 115 Mass. 133, 136; *State v. Addy*, 43 N. J. L. (14 Vroom.) 113; *Weaver v. People*, 33 Mich. 296; *People v. Morrisette*, 20 How. Pr. 118.

The Massachusetts decision was upon the question whether placing an indictment on file entitled the prisoner to a discharge. The point was not involved in the New Jersey case, nor was it directly in issue in the Michigan case. In *People v. Morrisette*, 20 Howard Pr. 118, the judge expressly held that no court in that state had the pardoning power. "That power is reserved exclusively to the governor."

I can see no good reason or cause for exercising any such power. If the verdict of the jury is not warranted by the evidence, the judge can grant a new trial. If the indictment is bad, the judgment can be arrested. As a matter of policy the practice should not be followed. A case which would appear to call for a suspension of the sentence would justify the granting of a new trial and the entering of a *nolle prosequi*.

The only opinion which recognizes the power as existing is the Michigan case, although, as before stated, that was not the question before the court. The Michigan case was in substance this: The judge suspended sentence until the next term of court and released the prisoner on a nominal recognizance. The second term thereafter another judge temporarily holding the court, sentenced the prisoner. The supreme court, on error, held: "The failure to sentence at the next term was practically the abandonment of the prosecution, and that the act of the last judge was not the supplying of the trial judge's omissions, but was practically overruling his decision."

That decision is in point here. One circuit judge has no power to overrule the decision of another circuit judge in the same case. Only a court of review can do so. The decision of the judge who tried this case, that this prisoner should be discharged and that the sentence of the law should not be pronounced against him, must stand until reversed by a higher court, however erroneous I may judge it to be. Even if the power to suspend sentence is admitted, the reasons for the suspension do not appear of record. I have no doubt the ex-judge acted conscientiously. I know of no writ authorized by law by which this defendant being once thus discharged

can be seized and brought before this court. Being illegally in custody and finding no power or authority to set aside or overrule the judge, who suspended the sentence, the defendant must be discharged.

I admit this matter of suspending sentence has of late years come into practice, in this and other states. Even justices of the peace exercise the power to suspend the law. It is in my opinion a dangerous practice.

If the judge who tried Ford and Murphy, lately executed at New Orleans, had arbitrarily suspended judgment and discharged the murderers, the public would have been aroused to the danger of having such power exercised by judges. If the power exists in one case, it exists in all. A Ford or a Murphy may yet have a sentence suspended.

(Recorder's Court of Chicago.)

The People

vs.

Edward Rummel.

(February 15, 1870.)

1. **CONTEMPT—FAILURE TO OBEY SUBPOENA DUCES TECUM—MATERIALITY OF EVIDENCE.** In an application for attachment for failure to comply with an order to produce papers it is proper for the court to look into the nature of the evidence proposed, to see whether or not if produced they would be admissible in evidence; this can be usually determined on a rule to show cause.
2. **SUBPOENA DUCES TECUM—WHEN INSUFFICIENT.** "Papers which were presented to the governor" is too indefinite a phrase upon which to base an action for refusing to obey a subpoena *duces tecum*.
3. **CRIMINAL LIBEL—PRIVILEGED COMMUNICATION—PETITION FOR RELIEF.** A petition to the governor for a reprieve is a proceeding "in the regular course of justice" and as such is privileged if the matter contained therein is pertinent, and the governor cannot be compelled to produce the petition in order that an indictment for libel may be based thereon. Such a communica-

tion is also privileged because it is a confidential communication sent to the governor of a state in the course of a duty he is called upon to perform as an officer, and is inadmissible to form the basis of an indictment unless there is a showing that there was libelous matter maliciously inserted and not pertinent to the petition.

Motion to attach the secretary of state for contempt.

MCALLISTER, J.:—

This is an application made by the state's attorney for an attachment against Edward Rummel, secretary of state, for non-compliance with a *subpoena duces tecum*. The chief and pertinent facts are simply these: that a few days ago a complaint was made before the grand jury of this court, against divers citizens of Chicago for an alleged libel consisting of matter contained in a petition signed by these parties and presented to the governor, asking for the commutation of the sentence of Daniel Walsh, who was under sentence of death; that there was contained in that petition a statement that the person whom Daniel Walsh murdered was his wife, and that she had been unfaithful to her marital relations, and in a fit of frenzy, arising from that condition of affairs, he took her life. The subpoena was issued upon the 11th day of January, 1870, was served on the secretary on the 12th day of February, and he declined to appear and produce the document mentioned in the subpoena.

It is not material in this application, as I view the subject, whether he put his refusal upon the proper ground or not. He declined to produce the paper himself, or to send it by a messenger.

The first question which occurred to my mind was, whether in this application for an attachment it was proper for the court to look into the nature and character of the evidence proposed, and to determine whether, if the paper was produced, it would be admissible in evidence, it being very clear to my mind that if the paper itself would not be admissible in evidence for any good reason, it would be arbitrary and oppressive to issue an attachment to compel the secretary

or governor of the state to come from Springfield here for the purpose of performing a useless act.

The proper practice generally would be, in such a case, to obtain an order to show cause why an attachment should not issue, and then all the facts proper to be considered could be presented; but as the character of the paper, and uses which were made thereof, appear upon the face of the subpoena itself, it is quite as well to decide it on what appears there, as to make the order to show cause, and require the secretary of state to come here and make the same appearance. The order is, "We command you to summon Edward Rummel to bring with him the petition and papers which were presented to the governor of the state of Illinois for the commutation of the sentence of Daniel Walsh."

It is also a general rule that a *subpoena duces tecum* should definitely define the papers which the party or witness is commanded to produce. So far as it relates to the petition itself, it may be sufficiently defined, but the expression, "and papers which were presented," is too indefinite to base any action on whatever.

Now, as to the first point, whether the court has a right to examine into the nature of the evidence proposed, to determine whether it would be admissible on an application for an attachment, I have a case directly in point, the case of *Rex v. Samuel Dixon*, 3 Burrows, 1687.

"A subpoena out of the Crown Office had been served upon Mr. Samuel Dixon, an attorney, with a *duces tecum* of certain papers hereafter mentioned, to give evidence before the grand jury of the county of Northampton, at the last assizes there, and to produce three vouchers which had been produced and insisted upon by one Mr. Peach, Mr. Dixon's client, before a Master in Chancery; and this subpoena, with the *duces tecum*, was in order to found a prosecution by way of indictment against Peach (who had produced these vouchers before the Master), for forgery. Mr. Dixon did not appear before the grand jury, in obedience to this subpoena, whereupon, on Monday, the 6th inst., Mr. Wallace moved, on behalf of the prosecutor, for an attachment against him for refusing to ap-

pear, and had a rule to show cause. Mr. Caldecott now shewed cause. He insisted that Mr. Dixon could give no other evidence but of what had been communicated to him by his client in confidence, and therefore he was not compellable to produce these papers against his client, in order to prove him guilty of a forgery. Lord Mansfield was clearly of this opinion, and that Mr. Dixon, instead of producing them against his client, ought to have, immediately upon receiving the subpoena, delivered them up to his client. Mr. Justice Wilmot concurred that he ought not to have produced them against his client. Mr. Justice Yates was of the same opinion, and thought the rule ought to be discharged with costs. Rule discharged with costs."

This case is quoted by Lord Ellenboro, with approbation, in the case of *Haley v. Long* (9 East.), and has never been attacked or shaken as an authority on that question. The principle of it is, that, upon an application for an attachment against a witness for not obeying a *subpoena duces tecum*, it is proper for the court to look at the nature and character of the document proposed to be introduced as evidence, and determine whether or not it is admissible.

The next point to be determined on this application is whether the petition signed by the parties against whom the complaint is made, and caused to be presented by them or other persons to the governor, upon an application made to him to commute the sentence, is one that can be extorted from the possession of the governor or secretary of state, and introduced in evidence as the foundation of an indictment for libel. If this document, under the circumstances, is what would be called a privileged proceeding and communication, then it is not admissible in evidence.

There is a variety of cases upon this subject, under the various heads of applications made to the grand jury, applications made to government officers, to commissioners—from all of which the rule may be deduced that, when the proceeding is one authorized by law, it is privileged, and whatever is said in any paper connected with that proceeding, which is pertinent to the proceeding itself, is privileged,

and cannot be the basis for an action or indictment for libel. The rule is as properly stated as in any case in the case of *Gilbert v. The People*, 1 Denio, 43. The court there says:

"Whatever may be said or written by a party to a judicial proceeding, or by his attorney, solicitor, or counsel therein, if pertinent and material to the matter in controversy, is privileged, and, consequently, lays no foundation for a private action or a public prosecution. The general language of elementary writers is, that whatever occurs in the regular course of justice is privileged, and by which they intend to indicate the principle I have stated."

Now, this is not, directly, a judicial proceeding; but it is a proceeding in the "regular course of justice."

The constitution of the state of Illinois contains this section (Constitution 1848, article IV, sec. 8):

"The governor shall have power to grant reprieves, commutations, and pardons, after conviction, for all offenses except treason and cases of impeachment, on such conditions and with such restrictions and limitations as he may think proper, subject to such regulations as may be provided by law relative to the manner of applying for pardons."

There is no manner provided by law relative to the manner of applying to the governor. The common mode in all the states of this union, unless provision is made by law, is to make application by petition, and, of the petition made to the governor to exercise the power thus given to him by the constitution, it may be said that it may be regarded as a regular proceeding in the absence of any provision of law for another and different proceeding, and it follows, as a matter of course, that anything stated in the petition for that purpose, that would be pertinent to the application itself, would be privileged under the rules now established by the courts of the country. The leading case in the state of New York is the case of *Thorn v. Blanchard*, 5 Johns. 508. That was where divers inhabitants of a county presented a petition to the council of appointment, stating that B., district attorney, was actuated by improper motives in his official conduct and praying that he might be removed from office, which petition

was read by the council, who removed B. from office. It was held that an action would not lie against A. at the suit of B., though the words be false and actionable in themselves. All the authorities, so far as they relate to civil actions, are reviewed in this case.

It might be said that there could be no protection given to those who circulated the petition. It will be apparent to any one that if the power is given to present a petition properly drawn, it being a necessary incident to the right that it should be circulated for the purpose of being signed, that it would come within the privilege precisely as much as presenting the petition to the governor. I refer to the case of *Vanderzee v. McGregor*, 12 Wendell, 545. This was:

A memorial presented to a board of excise, remonstrating against the granting of a license to a particular individual to keep a tavern, charging him with stirring up justices' suits, with a view of having the causes tried at his tavern, and the court decided that "no action lies as for the publication of a libel unless express malice be proved." The court say, "Perhaps the presenting the petition to different individuals for their signature might be considered a publication of the libel, and not covered by the privilege; but I am inclined to think that if the nature of the communication is such as to be privileged, when presented to the tribunal for which it was originally designed that it cannot be a libelous publication of it to present it to others for their signature. The nature of the transaction requires that the memorial should be circulated to obtain signatures; and, unless express malice is shown, the conclusion of law, within the principle above adverted to is, that it was circulated with a *bona fide* intent of obtaining signatures, and not to propagate slanderous charges against the party."

If it be maintained that this is not a privileged communication, then it follows, as a matter of course, that the right of petitioning the governor to pardon, or commute, under certain circumstances, is entirely taken away. The indictment, if one were found in this case, would be for a writing whose tendency was to "blacken the memory of the dead,"

and the statute which defines libel in that manner also provides that the truth may be given in justification in all cases, except where the indictment is for a libel tending to "blacken the memory of the dead or to expose the natural defects of the living." So that under an indictment for this class of libel, it would not be advisable to give the truth in evidence.

Let us use an illustration for the purpose of testing the position as taken by those who claim that this is not a privileged communication. Suppose, for instance, that Mr. Samuel Hale should wake up in the night thinking that he heard some person in his house. He should seize his gun or pistol, and in going to the door should see a man emerging from his door, running away from his house. He shoots at him, the shot takes effect and kills the person. If complaint is made against him as his case would stand under the law of the land, he would be guilty of murder; that killing would not be in self-defense, or in defense of his property or any of his family, but he killed the man when he was retreating, after he had committed the offense, and it would be as much murder as if he shot him next day, or went into the jail, after his capture, and shot him there. Supposing he is proceeded against and convicted, it would be murder; there would be no defense; there must be a perversion of law or perjury by the jury to acquit him, and the jury must fix his punishment at imprisonment for life. The citizens are aroused; they think the sentence unjust, and wish to apply to the governor for a pardon. It would not be sufficient to allege in the petition that Mr. Hale was always a respectable citizen. Dr. Webster was a respectable citizen; John C. Colt was a respectable citizen. It would be necessary to show to the governor the circumstances under which the shooting took place. They proceed to write down that the deceased was a burglar; he had already committed a burglary; was notorious, perhaps, and had been convicted for burglary; the deceased was in his house, and under the excitement of the time and the occasion, he used firearms upon him and killed him, under circumstances which the law would not justify. The moment you write down the word "burglar" in that petition you are

guilty of a libel; you blacken the memory of the dead, and every man who signs that petition is guilty of a crime before the law, and, when he is indicted, he can't prove that that man was a burglar in fact, because the statute forbids it. The law is not guilty of any such absurdity. When it is properly understood it harmonizes in all its particulars. This statute was not intended to apply to any such case.

Carrying the illustration a little further, suppose some of our enterprising newspaper men should send down to Springfield and obtain a copy of the petition and publish it in their newspaper. They have published a libel. They are indicted. What will they say? Can they give the truth in evidence? No! What would be their defense? Certainly, if every man who signed this petition aided in forwarding it to the governor for the purpose of having him act upon it under the constitutional power vested in him were guilty of libel by that act itself, then they were guilty of libel when they published it. Their only defense would be that this was a paper used in the "regular course of justice," and they had a right to publish it for that reason. Upon no other ground could they defend themselves against an indictment for libel.

There is another position that may be taken in this case, that the rule of privilege extends to all confidential communications sent to the president of the United States, or to the governor of a state, in the course of the performance of any duty that he may perform as an officer, and was so decided on the Burr trial by Chief Justice Marshall. I have a case here, the case of *Gray v. Pentland*, 2 Serg. & R. 23:

"A subpoena had issued from the court below and had been served, directed to the governor and secretary of the commonwealth, with a *duces tecum* for the deposition." That was a deposition which was alleged to have amounted to a libel, "and a rule was entered for the purpose of taking their depositions in Harrisburg. But they declined appearing, either under the rule or the subpoena. They also declined delivering to the plaintiff the deposition made by the defendant."

Breckenridge, J., giving the opinion of the court, says: "As to the governor, in this case, being compelled to give

the deposition or writing transmitted to him, I am inclined to think it cannot be done. It must be a matter within his discretion to furnish or refuse it, and this on the ground of public policy."

This case was cited and approved by the supreme court of Pennsylvania by Chief Justice Gibson, in the case of *Youten v. Sanno*, 6 Watts, 166.

It is not pretended that the secretary of state knows any fact connected with this matter, independent of his being the mere legal custodian of that paper under the duties of his office. It may be necessary, in the case, to summon the governor as a witness, to show who presented it and what was said, and I hold, and it is a position that cannot be successfully overthrown, that the communication itself is a privileged communication, and the document is not admissible in evidence, as the foundation of an indictment, unless it shows that matter was thrown into the petition which was not pertinent to the application, and with the malicious design of merely blackening the memory of the dead. As this is an application for an attachment without obtaining an order to show cause, and there is no affidavit to anything in the case to show to the court that there is any such feature to this paper, it is my duty to presume, in the absence of such evidence, that there is no such feature to it and to deny this application.

(*Superior Court of Chicago.*)

James Pratt

vs.

Russell Grimes.

(October, 1869.)

APPEAL AND ERROR—POWER OF COURT WHERE CASE REVERSED AND REMANDED WITHOUT DIRECTIONS. Where a decree in equity in favor of the defendant has been reversed and the case remanded by the supreme court without directions the lower court has complete power over the disposition of the case.

Motion for leave to introduce further evidence in a case that had been reversed by the supreme court.

JAMESON, J.:—

This is a motion for leave to introduce further evidence in a case that has come from the supreme court. That court reversed the decree, and remanded the case without any directions, simply saying: "We reverse the decree on the ground that there is no sufficient proof of settlement, and remand the cause." It is contended by the party prevailing that all we have to do is to enter a decree. On the part of the defendant here, it is contended that this order does not preclude the introduction of further testimony, and a hearing of the case.

On the part of the complainant, a case has been read to the court from 1 Kane, 586, at law, which is supposed to settle the rule as the complainant contends it should be. In that case, the court of errors of New York reversed a case that had come up from the supreme court, and ordered the court below to enter an order decreeing a hearing of the matter *de novo* for a new trial by a jury. The order of the court of errors was not obeyed by the court below. A new trial was had, but without the issuing of an order for a *venire*. The case going again to the court of errors, it was held that that was error; that the court below should have first entered an order for a *venire de novo*, and thereupon a new trial would properly have been had. Because there was no such order entered, the case was remanded again. This is a case at law, and even if it was in its circumstances precisely similar to this—that is, had the court of errors merely reversed and remanded the case without direction, I doubt very much if it would have applied to a case in chancery. On the other hand, the defendant has read several cases which I think establish a contrary rule. In the case of *Wescot v. Woodworth*, 1 Hopkins, Ch. 576, it was held that where a case had been taken to the supreme court, and an order of remanding the case was entered, that it was the duty of the court below to allow evidence anew as to a party who had

been made a party to the suit after the evidence as to other defendants had been taken originally. It seems that there were certain defendants; the case had been prepared for trial in the court below as to them, and all the evidence taken, and then another party was made party to the suit. The court went on and entered a decree, and in the supreme court the case was reversed and remanded. The new party to the case claimed the right to introduce evidence on the hearing, which was overruled, and the case was heard on the evidence originally in the case. The supreme court held that that was error. There are also two cases in 3 Dana (Ky.), 76, 536 (*Riley v. Wiley*; *Broadhus v. Broadhus*), to this effect: where a cause has been reversed and remanded without directions, the court below has the same power over it as though it had never been to a higher court, and of course it may either set aside orders entered in the cause that was originally before it, or it may make such decree as seems to be equitable and just. I think that these two cases are pertinent to this, and must govern. In this case it is claimed by the defendant that one of the depositions used on the trial in this court was not taken to the supreme court. It formed no part of the record, but was lost, and it is claimed had that deposition been on file as a part of the record, the case might have been very different in the supreme court. This presents a strong equitable claim for the allowance of this motion.

The motion is allowed.

NOTE.

Case on former appeal, see *Pratt v. Grimes*, 48 Ill. 376.—Ed.

(Circuit Court of Peoria County.)

A. M. Wiley, et al.

VS.

James Smith, Collector of Elmwood Township, and C., B. &
Q. R. R. Co.

(February, 1870.)

1. RAILROAD AID SUBSCRIPTION—VALIDATION OF VOID SUBSCRIPTION BY LEGISLATURE. Where a township by resolution voted to subscribe forty thousand dollars more to the capital stock of a railroad corporation than it was authorized by law to do; though such a subscription be illegal, yet it can be made valid by a subsequent act of the legislature.
2. SAME—VOTE OF PEOPLE NOT NECESSARY. The legislature can authorize such a subscription without a vote of the people to be effected thereby.
3. STATUTES—CONSTITUTIONALITY—DUTY OF COURTS. A court ought not to declare a statute unconstitutional unless the opposition between it and the constitution is clear.
4. INJUNCTION—DOUBTFUL CASE. An injunction should not be issued in a doubtful case.

PUTERBAUGH, J., after stating the facts in the case; discussing when a court of chancery will interfere to prevent the collection of taxes; the authority of towns and cities to subscribe for stock in aid of the construction of railroads, and holding that the subscription of the township of Elmwood to the stock of the Dixon Peoria and Hannibal railroad company of thirty-five thousand dollars, as authorized by the charter of said company was valid, concluded as follows:

On the day of the election one of the citizens offered a resolution which was adopted, as follows:

“Resolved, That it is expedient for the township of Elmwood to subscribe to the capital stock of the Dixon, Peoria and Hannibal railroad company, in addition to the thirty-five thousand dollars authorized by the charter of said company, the further sum of forty thousand dollars; and that the poll list and box be now open for the legal voters of this town

to vote, 'For subscription,' or 'Against subscription,' to that amount, and that the terms and conditions of subscriptions to the same, be the same as those upon which the vote for thirty-five thousand dollars as authorized by the charter, is this day to be taken, and that this poll list and box be kept open for the reception of votes until six o'clock, p. m., of this day."

The subscription of forty thousand dollars was carried, by this vote, by a large majority.

To show that the proceedings in calling this town meeting, and in voting forty thousand dollars additional subscription, was illegal, no argument is needed. It is sufficient to say that it was wholly unwarranted and unauthorized by law.

It is claimed by the defendants that this vote, though void at the time of the election, has been legalized by subsequent acts of the legislature.

Before the subscription was made, but after the election referred to, viz.: April 17, 1869, the legislature passed "an act to legalize the election in relation to this subscription."

The act provides that a certain election held in the township of Elmwood, in Peoria county, on the 16th day of March, A. D. 1869, at which a majority of the legal voters of said township, in special town meeting, voted to subscribe for and take forty thousand dollars of the capital stock of the Dixon, Peoria, and Hannibal railroad company, over and above the \$35,000 which was, on the same day, subscribed for and taken in accordance with the provisions of the charter of said company, is hereby legalized and confirmed, and is declared to be binding upon said township, and the said forty thousand dollars, when subscribed, according to the conditions of said vote, may be collected from said township in the same manner as if the said subscription had been made under the provisions of said charter.

This act, if it is within the power of the legislature under the constitution so to do, seems to cure the illegality of the election referred to.

It is urged that it is not within the power of the legislature to make a void act valid, and that the act is repugnant

to that part of the constitution which prohibits the passage of *ex post facto* laws.

The policy of passing laws by our legislature imposing the burden of taxation upon the people of a locality for any specified purpose, without their consent expressed at a legal election may well be questioned. Voters are not required to attend any election in order to be bound by it, unless it is a legal election held according to the forms of the law.

If the question was an open one, I should hesitate before subscribing to the doctrine, that the legislature has power to authorize the officers of any county, city or town to take stock in any public enterprise, without first submitting the matter to the citizens for their approval or rejection.

But that question may be considered as settled. It has been frequently held by the supreme court of this state, as well as that of other states, that it is competent for the legislature to bestow the power directly upon a county, city or town to subscribe for and take stock in a railroad, without requiring the subject to be submitted to a vote of the people. *Johnson v. Stark County*, 24 Ill. 75; *Perkins et al. v. Trustees, etc.*, 24 Ill. 208; *Town of Keithsburg v. Frisk*, 34 Ill. 405.

If the legislature has the power to authorize town officers to subscribe stock in a railroad company, without the vote of the people to be taxed, by a parity of reasoning, it would seem that it has the power to pass a curative act as in this case. Laws of this character are frequently passed to secure the collection of taxes defectively levied, and they have always been sustained by the courts. *Cowgill et al. v. Long*, 15 Ill. 202; *City of Bridgeport v. Housatonic R. R. Co.*, 15 Conn. 475; *Board of Commissioners v. Bright*, 18 Ind. 93; *Town of Keithsburg v. Frisk*, 34 Ill. 405; *McMillen v. Boyles*, 6 Iowa, 304; *Thomson v. Lee County* (Iowa), 3 Wallace, 381; *Gelpcke v. The City of Dubuque*, 1 Wallace, 175.

The rule which is laid down by Cooley on Constitutional Limitations, as applicable to cases of this nature, is this: If the thing wanting or which failed to be done, and which constitutes the defect in the proceedings, is something which the legislature might have dispensed with the necessity of by

prior statute, then a subsequent statute dispensing with it retrospectively must be sustained. And so if the defect consists in doing something which the legislature might have made immaterial by prior law, it may also be made immaterial by subsequent law. Cooley's Const. Limitations, 371.

And so in this case, if the legislature, as we have seen, can authorize a subscription to a railroad company without a vote of the people, it can certainly give validity to an illegal election and authorize a subscription of stock under that vote.

In order to overthrow the action of the town authorities of Elmwood, in the view I take of this case, the court must pronounce an act of the legislature—a co-ordinate branch of the state government—unconstitutional and void. The question whether a law be void for its repugnancy to the constitution is at all times a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative in a doubtful case. A court ought not to declare a law unconstitutional, unless the opposition between it and the constitution is direct and clear. The policy of the act referred to is one of legislative discretion and not one of judicial cognizance.

The counsel for the complainants has suggested that if the court has a doubt as to the propriety of issuing an injunction in this case, that it ought to be granted, in order that the collection of the taxes may be stayed until the case is passed upon by the supreme court.

As I understand the law this extraordinary writ should never be issued in a doubtful case. The application has been heard upon the merits of the case, as admitted by counsel. It is not probable that any new facts will be elicited. The bonds have been issued and are probably in the hands of innocent parties, and unless this tax is collected any provision made for the payment of the interest that will soon fall due, the town of Elmwood will be liable to be sued upon every coupon for the current year, and thus become involved in a multiplicity of suits. While on the other hand it must be admitted that if the bonds are illegal, it will work a hardship upon the tax payers to be compelled to pay the assessment for the current year.

From the importance of the case, I regret that the pressing business of the court prevents a review of all the points raised by counsel in this case. I have been compelled to confine myself to the more important points, and have not had time to rewrite or review this opinion.

The injunction is denied.

(Circuit Court of Cook County. In Chancery.)

Cleveland Rolling Mill Co.

vs.

Henry Crawford, Great Southern Railway, et al.

(January, 1891.)

1. CREDITORS' BILL—APPOINTMENT OF RECEIVER IN FOREIGN STATE NO BAR TO. The pendency of a creditors' bill and the appointment of a receiver in a foreign state is no bar to the filing of a similar bill here.
2. RECEIVERS—APPOINTMENT IN FOREIGN STATE—NO TITLE TO ASSETS HERE. The appointment of a receiver in a foreign state does not prevent a legal or equitable attachment in Illinois as the receiver in the foreign state acquires no title to assets here.
3. CORPORATIONS—RIGHT TO ISSUE CAPITAL STOCK IN PAYMENT OF ITS DEBTS. A railroad corporation has the right to issue its stock to pay for the construction of its own road.
4. CREDITOR'S BILL BY CREDITOR OF CORPORATION. Where the creditor of a corporation seeks to compel a third person to account to the corporation, the creditor's equities are derivative and must be sought through the equities of the corporation.
5. CORPORATIONS—ENQUIRY INTO TITLE OF DIRECTORS TO THEIR OFFICE. The court will not enquire whether or not a contract is illegal because approved by a *de facto* and not a *de jure* board of directors as it cannot enquire collaterally into the title of the directors to their office and it was sufficient if the contract was made by a *de facto* board.
6. CORPORATIONS—MAJORITY STOCKHOLDERS CONTRACTING WITH CORPORATION. When the owner of 99 per cent of the capital stock of a corporation enters into a construction contract with the corporation the contract is not void, if made in good faith, with a *bona fide* board of directors acting in the usual discharge of their duties.
7. JUDGMENT AGAINST CORPORATION—BINDING ON STOCKHOLDERS. A stockholder cannot, in the absence of fraud, challenge a judgment against the corporation.

8. **CORPORATIONS—LIABILITY OF OWNER OF ALL STOCK.** Where the owner of all the stock of a corporation usurps all the functions of the board of directors, and takes possession of all the corporate property and controls it as his own private property, he must be held to the same liability as the directors would have been, had they converted the property to their own use.
9. **CORPORATIONS—CAPITAL STOCK.** The capital stock of a corporation is a trust fund for the benefit of creditors and neither the board of directors nor the corporation can give it away or divert it to the private use of the directors or other officers of the corporation.
10. **CORPORATIONS—USED AS A CLOAK FOR INDIVIDUAL ENTERPRISE.** The law authorizing the formation of corporations never intended that persons should carry on individual enterprises under the guise of corporate action.
11. **STOCKHOLDERS—DUTY TO CREDITORS.** In so far as shareholders have power to control the funds in which the corporate creditors have an interest, shareholders must be regarded as occupying towards them a position of trust.
12. **CORPORATIONS—LIABILITY OF OWNER OF ALL STOCK SELLING CORPORATE PROPERTY.** Where the owner of the entire stock of a corporation sells the corporate property and consents to the foreclosure of a mortgage thereon, in consideration of a certain payment, and for the purpose of cutting off general creditors, the court will compel such owner to account for the property on the proceeds of the sale.
13. **CORPORATIONS—RIGHT TO PREFER CREDITORS.** Where a corporation is insolvent and a receiver is in possession of its property, such property can be appropriated only to the payment of the corporate debts. A director who is also a creditor can not apply such property to the payment of his debt, to the exclusion of other creditors.
14. **CORPORATIONS—RIGHTS OF CREDITORS.** A corporation does not exist solely for the benefit of stockholders. It also exists for the benefit of its creditors.
15. **CORPORATIONS—INDIVIDUAL ENTERPRISES—LIABILITY OF OWNER OF ENTIRE CAPITAL STOCK.** If corporate form is used for individual enterprises, the individual as to creditors stands as a trustee *ex maleficio*, usurping the power and place of the legal trustee, the corporation. Any creditor would have the right to call him to account and he could not shield himself behind the nominal action of the corporation by its "dummy" board of directors.

Bill filed by the Cleveland Rolling Mill Company against Henry Crawford, H. H. Porter and the Chicago & Great Southern Railway Company for an accounting. Demurrer to same heard before Judge Murray F. Tuley. The facts are stated in the opinion.

Samuel W. Packard, for complainant.

Gardner, McFadden & Gardner, for defendants.

TULEY, J.:—

The allegations of the bill of complaint in this case are anomalous and probably very difficult of proof, but in deciding the demurrer, however, they must be taken as true. The bill is a creditor's bill, founded on a judgment against the defendant corporation for \$4,365.74; a return of *nulla bona* on an execution issued thereon, and seeks an accounting for certain property, and assets of the corporation alleged to be in the defendant, Crawford's, possession, and of certain moneys alleged to be due Crawford from the defendant Porter which ought to be applied in the discharge of complainant's judgment.

I will first dispose of some minor points before passing upon the main question made by the bill.

The pendency of a creditor's bill in Indiana upon the judgment of *Hack et al.*, in which a receiver was appointed, is no bar to the prosecution of this suit. The receiver in that case acquired no such title, by his appointment, to assets in this state as would prevent a legal or equitable attachment thereof by an Illinois creditor. *Rhawn v. Pearce*, 110 Ill. 356.

Nor does the pending of a creditor's bill in Indiana prevent the sustaining of a creditor's bill in this state. The complainant can have no relief as to the \$700,000 of stock issued by Crawford, as president, to himself, as the board of directors subsequently ordered it paid to him on account of the construction contract. It then ceased to be unpaid stock. A corporation has the right to use its own stock in payment for the construction of its own road. Crawford cannot be charged as a trustee in an express trust by the receipt of one million of bonds for the purposes expressed in the unsigned memorandum, for the reason that it does not appear therefrom that he agreed to appropriate the proceeds of the bonds to the payment of the creditors of the corporation. His agreement to furnish money to pay such creditors does not make him a trustee.

Treating the relations between Crawford and the board of

directors as in good faith and such as the law presumes to exist between them, the bill is defective in not making the specific allegation that Crawford has not accounted to the corporation for the stocks and bonds delivered him. In such a case the creditors' equity is derivative and must be sought through the equities of the corporation.

It is alleged that the bonds and stocks agreed to be paid for the construction of the road were greatly—four times, it is alleged—in excess of the cost thereof. No fraud is charged on the directors as to the making of the construction contract, and as no statement is found in the bill as to the actual cost or value of the work, the court cannot grant relief as to such contract, solely because it is alleged that an excessive price was agreed to be paid therefor.

The contract, it is charged, was never legally entered into because the Crawford board was only a *de facto* and not a *de jure* board. The court cannot in this proceeding inquire into the title of the directors to their office, and it was sufficient if the contract was made by a *de facto* board.

The mere fact that Crawford owned 99-100 of the stock would not make the construction contract void as being in effect a contract with himself. One great object in becoming a stockholder in a corporation is to avoid individual liability. No reason is perceived why such a stockholder may not enter into a construction contract, if made in good faith, with a *bona fide* board of directors acting in the usual discharge of their duties.

Crawford cannot challenge the judgment against the corporation. A judgment against the corporation is conclusive, in the absence of fraud, upon all stockholders. Thompson, Stockholders, secs. 329, 337, and cases cited.

This disposes of all the minor points raised upon the demurrer.

The main question and one of great importance is whether taking the allegations of this bill as true, can the defendant Crawford be held chargeable as trustee, and accountable, as such, to creditors for the property and assets of the corporation which came to his hands? The bill alleges in substance that about the year 1881 Crawford purchased the block

coal road which had about twenty miles of completed road, and shortly thereafter he bought the Great Southern railroad, an uncompleted road some 100 miles in length, and then consolidated the railroads under the laws of Indiana under the name of the Great Southern Railway. He undertook the completion as if it was private property, using large amounts of his own money in so doing, without consulting the nominal board of directors. That when he made the purchase of the Great Southern Railway he made it a condition that the board of directors should resign so that he could appoint his own board. That he appointed relatives and employees of his own as directors, and caused them to enter into a construction contract with himself by which he was to receive all the property of the corporation, and its bonds and stocks, to an amount several times in excess of the cost of construction.

It is alleged that in entering into the construction contract and in all their other acts, the members of the board of directors did not act of their own volition, but were simply instruments to register the wishes and desires of Crawford. That it was a bogus or "dummy" board and that its intervention in the affairs of the company was merely perfunctory and as the agent of Crawford. It is alleged that Crawford was as absolutely in the control of the corporation and of its assets as he could have been had it been a corporation sole, and he the member thereof, and therefore that equity should regard the substance and not the form of the transaction, and hold that in making its construction contract he, Crawford, was the only party to the same; that it was in effect a contract by himself with himself. Taking the allegations of the bill as true, there was only a form, a semblance of a corporation, and the building of this railroad was an individual and not a corporate enterprise. If, as alleged, Crawford did in fact usurp all the functions of the board of directors, and did take possession of the corporate property, and manage and control it as his own private property, and convert it to his own use, he must be held to the same liability as the directors would have been held, had they converted the property to their own use. It is not only charged that

he ignored the board of directors and usurped its functions, but also, that he ignored the construction contract and at his own will, without consulting the board, made contracts and contracted debts in the name of the corporation for work included in the construction contract, many of which debts still remain unpaid. It is the recognized American doctrine that the capital stock and property of a corporation is a trust fund, held primarily for the payment of creditors, and that neither the board of directors nor the corporation can give it away or divert it to the private use of the members of the board, or other officers of the corporation. If the board cannot do so, one who usurps its functions and takes possession of the trust property and uses it and converts it as his own individual property, cannot do so.

If B usurps the functions of A and takes possession of the trust property of which A is the trustee, B will be held to account as trustee *ex maleficio*. And in this case if the allegations of the bill are true, Crawford must be held to account as trustee *ex maleficio* for all the corporate property which has come into his possession. It is the duty of a court of equity to strip the transaction of its corporation disguise and hold the real actor responsible. The law authorizing the formation of corporations never intended that persons should carry on individual enterprises under the disguise of corporate action. To do so is a fraud upon the law itself.

It also appears by the bill that the defendant Crawford entered into an arrangement with a syndicate which held, as collateral to Crawford's indebtedness, all the bonds and stock of the corporation which had then been issued, by which he sold the railroad to the syndicate and agreed that the construction contract should be cancelled, the trust deed securing the first mortgage bonds be foreclosed, and the property of the corporation sold, and thereby the claims of the creditors and stockholders extinguished, in consideration of the payment to Crawford of \$250,000, of the profits to be made by such foreclosure and sale; or, if the syndicate should buy in the railroad at such foreclosure sale, it would form a new corporation and give him one-third of the new stock, or the \$250,000, at the option of the syndicate. It was in fact a

sale of the equity of redemption in all the property of the corporation by the owner of nearly all the capital stock to the mortgagee for such owner's (Crawford's) own benefit and advantage. Says Taylor: "In so far as shareholders constituting the body corporate have power to control the funds in which creditors have legally protected interests, shareholders must be regarded as occupying towards them a position of trust, for the latter have ordinarily no voice in the corporate management." Taylor, Corp. sec. 710; see also *Railroad Co. v. Howard*, 7 Wall. 392.

No matter what form this sale of the road to the syndicate took, it was in substance a sale of the railroad by a shareholder owning practically all the capital stock, to cut off general creditors and benefit himself at their expense. A court of equity looks through the forms of transactions to the substance. *Beach v. Shaw*, 57 Ill. 17. Crawford must in such case account to the creditors either for the property of the corporation in which they had a legally protected interest, which was thus sold by them, or for the proceeds of the sale received by him.

There is also another ground upon which Crawford is liable to account to creditors. At the time of this sale to the syndicate the corporation was in a state of bankruptcy and in the hands of a receiver whom it is alleged Crawford procured to be appointed. That being the case, the corporate property was a trust fund for creditors which it was the duty of the directors and of the parties in control thereof to appropriate only to the payment of the corporate debts. No director being a creditor could lawfully appropriate it to the payment of his debt, to the exclusion of other creditors, yet this in substance is what Crawford, a director and president of the corporation, has done. If such acts can be done with impunity, then the law authorizing corporations is to enable private individuals to successfully defraud *bona fide* creditors.

A corporation is a composite artificial being. "It is," says Taylor, "the manifestation of a body of rules of law in legal relations, between persons who have fulfilled the prerequisite conditions of fact." . . .

"But the legal relations which arise immediately consequent upon incorporation are not its entire consequences. Incorporation has a further indirect result, namely, that future acts in respect to corporate enterprises will give rise to legal relations different from those which such acts would have occasioned, had there been no incorporation." Taylor, Corp. secs. 28, 29.

A corporation does not exist solely for the benefit of stockholders. It exists also for the benefit of creditors when it has any. Under the American doctrine a corporation is a trustee of the corporate property for its creditors, and creditors have an equity as to the corporation property, superior to that of the stockholders. The creditor also has the right to demand that this trustee, the corporation, shall seek relief as to such trust property, the legal title to which is in its name, and if it refuses, or if the corporation is dominated by influences adverse to the creditor, the creditor himself may seek relief in the name of the corporation to the extent at least of the payment of his debt.

This right to inquire into the disposition that has been made of the corporate property becomes a right inherent in the constitution of the corporate body, and absolutely necessary to the protection of the creditors' interests in the property of the corporation. It may be said to be a primary equity and not a derivative one.

If the form of a corporation is used, as in this case, for individual enterprises and purposes, the individual, while he would be estopped to deny the title of the corporation to the property—he would, as to creditors, stand as a trustee *ex maleficio*, usurping the power and place of the legal trustee, the corporation. Any creditor or other *cestue que trust*, would have the right to call him to an account. He could no more shield himself behind the nominal action of the corporation by its "dummy" board of directors than a guardian, or executor *de son tort* could shield himself behind the accounts of the legal guardian or executor procured to be made in the name of such legal guardian or executor. *Lehman v. Rothbarth*, 111 Ill. 185.

The position taken by the court in this case may be without precedent, but no new equity in favor of creditors is attempted to be created or new principle announced. It is only an application of well established maxims and rules of equity to a new phase of business and commercial life. "Equity regards the substance not the form of the transaction." Why should courts of equity continue to shut their eyes to that which all the world can see, to-wit, that it has become a common practice in the business world to use corporation forms in the prosecution of individual schemes, upon the failure of which, the loss is saddled upon innocent creditors and minority stockholders.

Creditors are absolutely without any remedy unless the doctrine here announced can be sustained. If it cannot, the doctrine of the American courts, that the capital stock and other property of a corporation is to be deemed a trust fund for the payment of the debts of the corporation, may as well be abandoned at once.

The demurrer must be overruled and the defendants held to answer.

The Benedictine Order

VS.

Potter Palmer.

(Dec. 14, 1880.)

1. **VENDOR AND PURCHASER—SPECIFIC PERFORMANCE—MARKETABLE TITLE—WHAT CONSTITUTES.** The purchaser of property before he can be compelled to specifically perform his contract has the right to demand a "marketable title," that is, a title which will be saleable in the market. If there is a reasonable doubt it is not a marketable title.
2. **SAME—DOUBT AS TO TRUSTS.** Certain persons purchased a piece of property as commissioners of the "German Catholic Church" and received a deed "for the German Catholic Church," held that these recitals showed that the commissioners acted in a trust capacity, but did not show for what church nor by whom the purchase money was paid.

Bill for specific performance. The facts are stated in the opinion.

TULEY, J.:—

In the view I take of this case it is not necessary for me to pass upon the validity of the title held by complainant nor whether its deed, together with that of the bishop's, will confer a good title. The purchaser of property, before he can be required to specifically perform the contract, has the right to demand a marketable title. I use the term "marketable title" in the sense used by the American courts, not in the technical sense it is used by the English courts. It must be a title which will be a saleable title in the market. Unless a title is free from any reasonable doubt, it is not a marketable title, nor is it one as to which a chancellor will enforce specific performance. The doubt affects the discretion which in such cases is vested in a chancellor. This doubt concerning a title may relate either to the facts or the law of the case. If as to the law of the case, it may be as to the construction of some deed or instrument which enters into the chain of title.

Steffen and Briesbach purchased in 1848 of the canal trustees, as commissioners of the German Catholic Church, and in 1852 received a deed for the "German Catholic Church." These recitals show they acted in a trust capacity, but for what church? With whose money does not appear by record or oral proof. I cannot assume that the church was the St. Joseph Church, nor that the congregation of that church furnished the money. Nor can I assume that the money came from the bishop's treasury.

Not only does this lack of evidence create a reasonable doubt, as to the trusts upon which Steffen and Briesbach held the property, but on account thereof I am unable to give a construction to the trusts afterwards declared in the deeds of Steffen and Briesbach to the bishop and the deed of the bishop to the Benedictine Order.

I am inclined to the opinion that the purchaser having the deed of the complainant and of the bishop would never be

disturbed in possession, but under the law, well settled, there being a "reasonable doubt" as to this title, and it not being, by reason thereof, a "marketable title," I cannot force this defendant to accept of the same.

(Criminal Court of Cook County.)

People of the State of Illinois

vs.

Maud Lyons and Edward Lyons.

(1884.)

CRIMINAL LAW—RIGHT TO WAIVE JURY TRIAL. Where a defendant in a criminal case voluntarily waived his right to a trial by jury and requested the court to hear all questions of law and fact without the intervention of a jury, which waiver was duly entered of record, and the cause was thereupon tried by the court and the defendant found guilty, the waiver is binding on the defendant, and the judgment of the court cannot be set aside.

Motion to vacate judgment. Heard before Judge Williamson.

Thompson & Felsenthal, attorneys for defendants.

WILLIAMSON, J.:—

At the April term, defendants were brought into court for trial, upon a plea of not guilty, to an indictment for obtaining money by means of a confidence game. The case was called for trial and a jury had been ordered into the box, when said defendants in person and by George Sparling, their attorney (selected and employed by themselves), voluntarily and without solicitation, appeared before the bar of the court, and expressly waived their right of trial by a jury, and requested me as the presiding judge of said court, to hear and determine all the questions of law and of fact on the trial of said cause without the intervention of a jury, which

waiver was duly entered of record, and thereupon the cause was tried by me, as such judge, and after the evidence and arguments of counsel had been heard, the defendants were found guilty.

No motion for a new trial being interposed by said defendants, or either of them (their said attorney being still present in court), and after their statement to the court that they had nothing further to urge why sentence should not be pronounced upon said finding, they were then and there duly sentenced to imprisonment in the penitentiary for three and five years respectively.

At the May term of this court, the said defendants again appear, and by Henry Wendell Thompson, their attorney, move the court to vacate said finding and judgment, upon the ground that the same are null and void, for the reason that the waiver of their right to a trial by a jury was not in law binding upon them, and, therefore, conferred no jurisdiction upon the court to try said cause. The question thus presented is, could these defendants, under the circumstances above recited, legally waive their constitutional right to a trial by jury?

The precise question has never been passed upon by our supreme court, and the decisions of other courts of last resort, bearing upon the question, are far from harmonious.

It is an important question, for the reason, that under the practice in this court for some time past, by most if not all the judges holding the same, scores of persons have been sentenced to the penitentiary upon such findings, and scores of others have been in the same way found not guilty and set at liberty, all of which is decidedly wrong unless the proceedings in this case are sanctioned by law.

To hold that such method of trying a cause is proper and legal in the case of a person who is poor and friendless, and therefore obliged to submit to the same and then in a similar case where the defendant has means or friends with which to help himself to hold the contrary, would be, in my opinion, infamous.

The law should bear equally upon all, and if this method

of trying causes is unlawful, it should be abandoned at once and in all cases.

In the case at bar it can not be doubted or denied that this court had jurisdiction of the subject-matter and the persons of the defendants (the only question being did the judge proceed legally in the trial of said cause) and therefore the following cases cited by defendants' counsel, to-wit: *Foley v. People*, Beecher's Breese, 57; *Peak v. People*, 71 Ill. 278; *Shissler v. People*, 93 Ill. 472; *Beesman v. City of Peoria*, 16 Ill. 484; *People v. Maynard*, 14 Ill. 419 and *Ginn v. Rogers*, 4 Gilman. 131, are not in point.

The case of *Hill v. People*, 16 Mich. 351, relied upon by defendants' counsel, where one of the jurors before whom the trial was had, was not a citizen of the United States, which was held to be a fatal error by said court is not important, as our own supreme court has held exactly the contrary in *Chase v. People*, 40 Ill. 352, where defendant was on trial for murder.

The following decisions of courts of last resort, cited by defendants' counsel, to-wit: *State v. Maine*, 27 Conn. 281; *State v. Lockwood*, 43 Wis. 403; *People v. O'Neil*, 48 Cal. 257; *Cancemi v. People*, 18 N. Y. 128; *State v. Mansfield*, 41 Mo. 470, and possibly some others, support the views taken by the defendants' counsel, but it is worthy of note that in two of said cases, *State v. Lockwood* and *People v. O'Neil*, the attorney representing the people in each case confessed that such a practice was not sanctioned by law, leaving no contest before said courts, and in *State v. Maine* and *Cancemi v. People*, no authorities are cited in support of said decisions; and in *State v. Mansfield*, it seems the Missouri code provides that in cases of misdemeanors defendant may waive a jury and be tried by the court, and it is argued that this provision evidently denies the right of such waiver in cases of felony.

The following cases, several of which are of recent date, decide more or less directly against the position taken by counsel for defendants, to-wit: *State v. Kaufman*, 51 Iowa, 578; *State v. Polson*, 29 Iowa, 133; *People v. Rathbun*, 21 Wendell, 509; *Price v. State*, 67 Ga. 723; *Commonwealth v.*

Dailey, 12 Cush. 80; *Murphy v. Commonwealth*, 1 Met. (Ky.) 365; *Tyra v. Commonwealth*, 2 Met. (Ky.) 1; *People v. Murray*, Criminal Law Magazine, March, 1884, page 223, the last case, decided by Judge Cooley of the Michigan supreme court in December, 1883,¹ wherein defendant waived his constitutional right to be confronted with witnesses and allowed depositions to be read in evidence which practice was sanctioned by the learned judge, and in deciding which he uses this language: "I shall always be ready to preserve in its integrity every constitutional right; but I do not understand that the constitution is an instrument to play fast and loose with in criminal cases any more than any other, or that it is the business of courts to be astute in the discovery of technical difficulties in the punishment of parties for their criminal conduct,"—is a strong case in favor of defendants' rights to waive constitutional provisions in their favor, but without reviewing in detail all the cases cited and examined, it is sufficient to say that the weight of said authorities seems to be against the position taken by defendants' counsel.

The decision of this motion, however, does not depend entirely upon the cases heretofore cited, for while our supreme court has not passed upon the precise question under consideration, it has passed upon questions very similar, in such a manner as to leave no doubt in my mind that it will not only sustain the agreement of these defendants to waive their constitutional right to a trial by jury as a matter of law, but will also compel them to deal honestly and fairly with this court.

In the case of *Perteet v. People*, 70 Ill. 171, wherein the defendant was charged with murder, found guilty and subsequently executed for said crime, our supreme court says: (p. 176) "There is a marked distinction, in many respects between the English practice and our own in criminal cases. The rigor of the English law at an early day, led humane judges to resort to technical rules to save the life of a criminal who was on trial for stealing the value of a few shillings,

¹ 52 Mich. 288.—Ed.

who was denied the right of counsel or the attendance of witnesses to vindicate his innocence. Under our laws a criminal stands in entirely a different attitude. He has a right to a speedy trial before a jury and court that are free from bias or prejudice. The laws of the land furnish him able counsel for his defense, whether he has money or not. The process of the court is at his command to compel the attendance of witnesses. In fact, our laws afford every facility for one charged with crime to obtain a fair and speedy trial. This being the case, many of the technical rules of the English practice are not in use under ours."

In the case of *The People v. Scates*, 3 Scam. 351, the court says: "It is said, that a prisoner, in a capital case, is standing upon all his rights, and can waive none of them, nor his counsel for him, and reference is made to *Normaque v. People*, Breese, 111, in support of this position. This case means nothing more than this: That a prisoner in a capital case is not to be presumed to waive any of his rights; but that he may, by express consent, admit them all away, can be neither doubted nor denied. He may certainly plead guilty, and thus deprive himself of one of the most valuable rights secured to the citizen, that of a trial by jury. If he can expressly admit away the whole case, then it follows that he can admit away a part of it, but will not be presumed to have done so. The consent must be expressly shown, and this is the whole scope of the doctrine of the case referred to." To the same effect are the cases of *McKinney v. People*, 2 Gilm. 540, 556; *Chase v. People*, 40 Ill. 352; and *Bulliner v. People*, 95 Ill. 394.

And in a recent case, *Sahlinger v. People*, 102 Ill. 241; the court says: "The constitutional right of a prisoner to appear and defend in person and by counsel to demand the nature and cause of the accusation, to meet the witnesses face to face was conferred for the protection and the benefit of one accused of a crime, but, like many other rights, no reason is perceived why it may not be waived by the prisoner. He may, if he sees proper, waive any trial, and plead guilty to an indictment. If he may do this, he may waive the right to

cross-examine a witness, or to be present when his case is argued to the jury, or when the verdict is received. * * * He can not be permitted to take advantage of his own wrong and thus defeat the ends of justice."

Upon principle and what I believe to be the weight of authority, I am of the opinion that the defendants' waiver of their right to a trial by jury is both legally and morally binding upon them.

The motion to vacate the finding and judgment is denied.

NOTE.

See the contrary decision of Judge McAllister on an application for habeas corpus (*People ex rel. v. Hanchett*, reported in this volume.)—Ed.

(Circuit Court of Cook County.)

People ex rel. Maud Lyons and Edward Lyons

vs.

Seth F. Hanchett, Sheriff.

(1884.)

1. **CRIMINAL LAW—HABEAS CORPUS.** The court is authorized in a *habeas corpus* proceeding to go back of the process on which a prisoner is held and enquire whether or not the judgment was void for want of power to render it.
2. **JURY IN CRIMINAL CASES.** The only tribunal possessing the legal power, under the laws of this state, to determine the legal question of the guilt of an accused, upon an indictment for felony, and under a plea of not guilty, is a jury of twelve men.
3. **SAME—CONSENT OF PRISONERS TO TRIAL BY COURT.** The only legally constituted tribunal for the trial of the guilt or innocence in a felony case, under a plea of not guilty, is a jury of twelve men. The court or judge is not the legally constituted tribunal to try such question. The judgment of a court finding a defendant guilty in such a case is utterly void even though the defendant consents to a trial before the court.

Indictment for felony. Petition for habeas corpus. Heard before Judge McAllister. The facts are stated in the opinion. *Thompson & Felsenthal*, for relators.

MCALLISTER, J.:—

This case is upon habeas corpus, on the petition of Maud and Ed. Lyons, who allege that they are unlawfully imprisoned by the sheriff of Cook county. The material facts are, that at the March term, 1884, of the criminal court of said county, an indictment was returned into court against the prisoners, containing five counts, each of which was for felony.

The first count charged that said Maud and Ed. Lyons, on, to-wit, March 1, 1884, in said county, "did unlawfully and feloniously obtain from Annie Thompson her money, by means and by use of the confidence game, contrary to the statute, etc." At the April term, the prisoners were arraigned upon said indictment, and both pleading not guilty, formally put themselves upon the country, thus tendering an issue, which could be legally tried by a jury only.

But the cause having been brought forward for trial, instead of such issue being tried by a jury, it was tried by the judge then presiding in said court, without a jury, under an agreement between the prisoners, their counsel and the state's attorney, that a jury be waived, and the cause tried by the court without a jury. The judge, after hearing the testimony, found both the prisoners guilty in manner and form as charged in the first count of the indictment, and on that finding alone gave judgment against them, that they be confined in the penitentiary at Joliet, at hard labor—the said Maud for three, and the said Ed. Lyons, for five years. A certified copy of these judgments, respectively, was made out and delivered to said sheriff, for the purpose of having said sentences carried into effect; and, thereupon, on the petition of the prisoners, the writ of habeas corpus herein was awarded, with the view of having the validity of said sentences inquired into. In his return to that writ, the sheriff has set out the copies of said judgments so made as aforesaid, as the sole cause of the detention of the prisoners by him.

If it appears that the prisoners are in custody by virtue of the process of a court legally constituted, then the court is limited in its inquiry and power to discharge by section

twenty-two of the habeas corpus act (R. S. 1874, p. 568), which provides: "If it appear that the prisoner is in custody by virtue of process from any court legally constituted, he can be discharged only for some of the following causes: 1. Where the court has exceeded the limits of its jurisdiction, either as to the matter, place, sum or person. * * * 4. Where the process, though in proper form, has been issued in a case, or under circumstances, where the law does not allow process or orders for imprisonment or arrest to issue. * * * 7. Where there is no general law, nor any judgment, order or decree of a court to authorize the process if in a civil suit, nor any conviction if in a criminal proceeding. No court or judge, on the return of a habeas corpus, shall, in any other matter, inquire into the legality or justice of a judgment or decree of a court legally constituted."

I am of opinion that those provisions confer upon this court authority to go back of the process, on which the prisoners are held, and inquire whether or not the judgment was void for want of power to render it. *People ex rel. v. Whitson*, 74 Ill. 20. The supreme court, on habeas corpus, has no other or greater powers, in this behalf, than the circuit court. The question to be decided is, whether from the record of the proceedings of the criminal court, in the case under consideration, and which I have properly before me, that court did not, in giving the judgment or sentence against the prisoners, act entirely outside of any authority conferred upon it by the laws of this state. If it did, then, manifestly, that judgment was void.

The bill of rights contains the declaration that, "No person shall be deprived of life, liberty or property, without due process of law." Also, that, "the right of trial by jury as heretofore enjoyed, shall remain inviolate; but the trial of civil cases before justices of the peace by a jury of less than twelve men may be authorized by law." Section 428 of the Criminal Code declares, "all trials for criminal offenses shall be conducted according to the course of the common law, except when this act points out a different mode." Section 431

provides: "Juries in all criminal cases shall be judges of the law and the fact."

By the common law, a jury of twelve men was the only tribunal which that law recognized for the trial of the question of the guilt of the accused, under an indictment, especially for a felony, and a plea of not guilty. About this there can be no controversy. Under that system, it was a fundamental principle that questions of fact were for the jury—of law, for the court. But by our criminal code, both law and fact are for the jury. The only tribunal possessing the legal power, under the laws of this state, to determine the question of the guilt of an accused, upon an indictment for felony, and under a plea of not guilty, is a jury of twelve men. And the determination of that matter by any other tribunal, or functionary, would not be due process of law. I say it without hesitancy, and challenge any lawyer to show to the contrary, that power, authority, or jurisdiction has never been conferred upon any court, or judge of any court, of this state, by any law, constitutional, statutory or common, to sit in the place of such jury, try the question of the guilt of the accused under a charge of felony and plea of not guilty, and sentence the prisoner to the gallows, or the penitentiary. Such an innovation would be subversive of all constitutional safeguards, and in the very teeth of the statutory provisions, above quoted.

It is not claimed by the state's attorney that any such power has been conferred upon the criminal court by any law of this state, but it is insisted that it is legal and proper, *and that it has become a common practice in the criminal court* so far as several of the judges of that court are concerned, for the judge or court to sit in the place and stead of a jury, by the consent of persons accused, even in cases of felony. Let us consider that position for a moment. The only legally constituted tribunal for the trial of the question of guilt or innocence, under the plea of not guilty, is a jury of twelve men. The court or judge, therefore, is not the legally constituted tribunal to try such questions. In the ab-

sence of a jury, the court, for the purpose of a trial of an issue to the country, has, by the law, no jurisdiction. It is not within its legal powers to sit as a substitute for the constitutional tribunal of twelve men. Now, when the court sat in the place of a jury, to pass upon the question of the guilt of these prisoners—both as to the law and the fact, from what source was his authority in the premises derived? Certainly not from the law. It was simply and entirely from the consent of the prisoners and the state's attorney.

It would have been just as competent, in my opinion, for the prisoners and state's attorney, to have agreed that the clerk of the court hear the case; because whatever authority there was for the procedure was by consent and act of the parties and not by the law. What more then, I ask, did such trial amount to than a species of arbitration? The principle that consent can not give jurisdiction of the subject-matter, renders the finding of the court, that the prisoners were guilty, *utterly void*. The state's attorney has cited many authorities showing that various of the constitutional safeguards, which an accused might properly insist upon, may be waived by him. That is not disputed. But there is one distinction which he overlooks, and that is, "that the substantial constitution of the legal tribunal, and the fundamental mode of its proceeding, are not within the power of the parties." *Cancemi v. The People*, 18 N. Y. 128, 136. This distinction is recognized with approval in *Pierson v. The People*, 79 N. Y. 424, 430.

It is in virtue of that distinction that the verdict in case of felony, where the jury, though by the consent of the accused, consist of a less number than twelve, is held to be void. *Allen v. The State*, 54 Ind. 461; *State v. Mansfield*, 41 Mo. 470; *State v. Maine*, 27 Conn. 281; *State v. Lockwood*, 43 Wis. 403.

Upon this question Judge Cooley says "Any less than this number of twelve would not be a common-law jury, and not such a jury as the constitution guarantees to accused parties, when a less number is not allowed in express terms; and the necessity of a full panel could not be waived—at least in a

case of felony—even by consent. The informity in case of a trial by jury of less than twelve, by consent, would be that the tribunal would be one unknown to the law created by mere voluntary act of the parties; and it would in effect be an attempt to submit to a species of arbitration the question whether the accused has been guilty of an offense against the state.” Cooley’s Constitutional Limitations, 4th ed. p. 395, and cases in note 1.

If the law will not permit a person accused of felony to dispense with even one juror, can it be maintained that he may properly dispense with the whole panel, by consent?

Under our system, no court of the state has the power, authority or jurisdiction to sentence an accused to the gallows, or to the penitentiary, except upon an indictment duly found, a plea of guilty or a verdict of guilty, by a jury. The substitution of the finding of the court, under the consent of the accused, leaves the court as destitute of the power to sentence, as if no step whatever had been taken, intervening the plea of not guilty, and the sentence. I think the judgment *is void*, and the prisoners entitled to be discharged from imprisonment under the process which the sheriff has returned as the cause of their detention.

Prisoners discharged.

NOTE.

The above case was cited in *People ex rel. v. McLaughrey*, decided by Judge Gibbons and reported in this volume, p. 210. See also the contrary decision of Judge Williamson on the motion to vacate the judgment in the original case of *People v. Lyons*, reported in this volume, p. 199.—Ed.

(Circuit Court of Cook County.)

The People of the State of Illinois ex rel. Jeremiah Corridon

vs.

B. W. McLaughrey, Warden, etc.

(1898.)

1. **HABEAS CORPUS—WHEN ISSUED.** If a prisoner is committed by the sentence of a court of competent jurisdiction, no other court of competent jurisdiction, or even of superior jurisdiction, can discharge him on *habeas corpus*, unless the judgment upon which he is imprisoned is absolutely void.
2. **SAME—DUTY TO REMAND PRISONER TO SHERIFF WHEN DISCHARGED ON HABEAS CORPUS.** Where the court by virtue of the statute discharges a prisoner because the trial court has exceeded its jurisdiction or authority, the prisoner should simply be released from his illegal restraint and then be remanded to the custody of the sheriff. In such a case the prisoner was not in jeopardy.
3. **VERDICT OF JURY—HOW RETURNED.** The method of returning a verdict of a jury in a criminal case at common law stated.
4. **VERDICT—DELIVERED AFTER SEPARATION OF JURY.** Where a jury in a criminal case was permitted to separate by the consent of the prisoner and the jury agreed upon a verdict finding the defendant guilty and sealed the same and separated, and the verdict was thereafter delivered in open court to the clerk in the absence of the jury, it was held that the proceeding was void and the prisoner having been in jeopardy was entitled to his discharge.

Petition for habeas corpus. Heard before Judge John Gibbons. The facts are stated in the opinion.

E. J. Batten and *H. W. Dikeman*, for relator.

F. L. Barnett, assistant state's attorney, for respondent.

GIBBONS, J.: —

In this case the prisoner was indicted with others, as I understand it for a burglary. He pleaded not guilty to the indictment, and thereupon a jury was called, empaneled and sworn to try the case. All the testimony was introduced on behalf of the people, and on behalf of the defendant, the arguments of counsel concluded, and the jury instructed re-

specting the law. The record shows that the jury was permitted to separate by consent of the prisoner and the polling of the jury was waived by him. The jury, after due deliberation, agreed upon a verdict, finding the defendant guilty as charged in the indictment, sealed the verdict and separated, and it was delivered, in open court, to the clerk the next morning, but the jury was not present, as the jurors had separated the night before and were not again called together in the case.

The able and conscientious assistant prosecuting attorney, Mr. Barnett, frankly admits that if the prisoner in this case was in jeopardy, in the sense that if the supreme court, on a writ of error would reverse the case, and remand the prisoner for trial, and that a plea of former jeopardy could be successfully interposed by the defendant upon such trial, that this court has the power, and it is its duty, to discharge the prisoner from his illegal imprisonment. In other words, that, while this is not a court of review in habeas corpus proceedings, that, if the case is such that nothing would be left for the supreme court to do but to order the discharge of the prisoner, on reversing the case, or if nothing was left to be done but to file a plea of former jeopardy, and that that plea could be sustained upon the evidence and upon the law, then that this court has the power, and it is its duty, to discharge the prisoner.

There is a good deal of uncertainty and misapprehension obtaining in this jurisdiction respecting the power of the court to discharge a prisoner on habeas corpus. The true rule is that if the prisoner was committed by the sentence of a court of competent jurisdiction, no other court of concurrent jurisdiction, or even of superior jurisdiction should discharge him on habeas corpus proceedings, unless the judgment upon which he is imprisoned is absolutely void. It is true that under one section of the Habeas Corpus Act the reviewing court is given power to discharge a prisoner if the trial court has exceeded its jurisdiction or its authority. But, in discharging the prisoner under such circumstances, the court would simply release him from his illegal restraint,

and remand him to the custody of the sheriff, either to give bail (if a bailable case) or to remain in jail until properly tried by a jury, if the trial that he had had was void. Mr. Justice McAllister (a jurist whose knowledge of the law every lawyer at the Chicago bar, and wherever else he is known, holds in the highest esteem) discharged a man on habeas corpus who had been indicted for a felony, waived a jury and consented to be tried before one of the judges of the criminal court. It is safe to assume the question was not raised before Judge McAllister in that case (*People v. Lyons*, 16 Chi. L. News, 320¹)—that, while it was his duty to release the prisoner from his illegal restraint, it was also his duty to remand him to the custody of the sheriff for another trial; because the trial which he had had was void, as the judge had no power to try him, and, therefore, the man was never in jeopardy. *Garvey's Case*, 7 Colo. 384, s. c. 4 Am. Law R. 254.

Now, if the case before me is one of that nature, then this man was not in jeopardy, and he may again be tried. The court, it is conceded, was legally constituted, and it was a court of competent jurisdiction for the trial of criminals, whether held for felony or misdemeanor. The record shows that a jury was duly impaneled and the trial proceeded in the usual way. Testimony was introduced, counsel were heard, and the instructions of the court given, and everything was perfectly regular up to the time of the separating of the jury. It was late in the day when the case was submitted, and the defendant agreed that the jury might seal their verdict and separate, and he waived the right to poll the jury, but he did not agree that the jury should be discharged or that the verdict should be returned into court in the absence of the jury.

What is the manner in which a verdict must be returned? Not by presenting the written verdict of the jury (although that is customary in this jurisdiction) to the clerk, to be filed in the presence or in the absence of the jury, as the case may be, but the order in which the verdict must be returned is as

¹ Reported in this volume at page 199—Ed.

follows: "When the jury have come to a unanimous determination with respect to their verdict, they return to the box and deliver it. The clerk then calls them over by their names, and asks them whether they agree on their verdict, to which they reply in the affirmative. He then demands, 'who shall say for them?' to which they answer 'their foreman.'" That is the common-law way of delivering a verdict, and is the proper way, unless changed by statute. This being done, he commands the prisoner to hold up his hand, and addresses them: "Look upon the prisoner, you that are sworn; how say you, is he guilty of the felony whereof he stands indicted, or not guilty?" The foreman then answers "guilty," or "not guilty," according to the conclusion to which the jury have arrived in their consultation. The officer then writes the word "guilty," or "not guilty," on the record, and again addresses the jury: "Hearken to your verdict as the court hath recorded it; you say that A. B. is guilty (or not guilty) of the felony whereof he stands indicted, and so say you all." That is substantially the course of procedure in all the states at the present day; but there are necessarily slight differences in the practice, and each court will pursue its accustomed course. There is no reason to believe that any minute departure from the old forms will vitiate that verdict. Hence it is sufficient in this jurisdiction that the verdict of the jury in writing signed by each juror or by the foreman is returned in the presence of the jury, the clerk then reads it aloud and asks them if this is their verdict, and if they answer in the affirmative it is accepted, but the prisoner may demand the jury to be polled, which is done by the clerk calling upon each juror to answer whether or not the verdict just read was and is now his verdict.

It has been adjudged time and again by courts of the highest respectability that the jury returning the verdict into court is not the rendition of the verdict, that is, that the returning of the paper verdict into court is not the rendition of the verdict of the jury, but that it is the oral interrogatory put by the clerk to the jury and the answer of the jury to the clerk which constitutes a legal verdict. Whether the same

formality is proceeded with as at common law, or the written verdict is returned, as in this jurisdiction, and the clerk interrogates the jury, in either event it has been frequently adjudged that the oral interrogatory and the entering of the verdict on the minute book (of course the filing of the verdict would suffice in our jurisdiction) is the rendition of the verdict.

The petitioner waived the right to poll the jury. He agreed that the jury might seal its verdict and separate, but that is as far as he went. He did not agree that the jury should not again assemble and listen to the reading of the verdict, or to the interrogation of the clerk as to whether or not the verdict returned was their verdict.

The common-law command "Look upon the prisoner, you that are sworn," has a peculiar significance that reaches back and has its foundation in the early history of jurisprudence. "Look upon the prisoner." That is an admonition to the jury to look upon him, probably for the last time, and say whether he is guilty, although they may have signed a verdict finding him guilty. Some juror may say "I agreed to this verdict because I wanted to get home to the bedside of my sick wife or child, but in thinking it over carefully I fear I acted hastily and did wrong." And this man may voluntarily, without being interrogated as to whether that is or is not his verdict, repent and stand up in the jury box and say "I agreed to that verdict but it was because I wanted to reach the bedside of my sick wife, and it is not my verdict." "Look upon the prisoner." Now this admonition has indeed its peculiar significance. There are many instances incident to criminal trials and many passages in history that remind us of the force of that expression as applied to criminal procedure; for example when Paul stood before Felix—he claimed to be a Roman citizen and that it was his privilege under the Roman law, to meet his witnesses face to face, and if they had aught against him that they would there accuse him. So it was when Christ looked upon Peter. He remembered what Christ had said to him, "Before the cock crows thou shalt deny me thrice," and Peter turned aside and wept;

and in the famous trial of Mary, Queen of Scots, she demanded that her accusers be brought to her that she might meet them face to face. There are hundreds of instances in history showing the significance which attaches to this fact, and, in the common parlance of the people, when one hears that another has accused him of some wrongdoing he will say, "He dare not do so to my face."

Coming back to the facts as they appear in the record, this man was in jeopardy. It was just the same as if the court had discharged the jury after the state had rested its case, seeing that there was not sufficient evidence to convict him. The court could not, after the jury was sworn to try the cause, and after any evidence is introduced material to the issue (no matter how slight the evidence) legally discharge the jury. The man is then in jeopardy, and the jury cannot be discharged without his consent, unless for some unforeseen accident. For example if a juror die or is taken suddenly ill, or they are kept out for a length of time, that the court can see that it would be useless for them to remain out longer. But without the consent of the prisoner, except in those cases, there cannot be a discharge of the jury by the court. Petitioner consented to everything that he had a right to consent to up to the very moment of the jury coming together again in his presence and rendering a verdict in open court. He did not consent to waive that formality. Now, then, the discharge of the jury without that consent is just the same as the discharge of the jury by the court at any stage of the proceedings, if it thought the prosecution had failed to make out its case or for any other cause without the consent of the prisoner. The prisoner could have consented, I am inclined to believe, that the jury should separate, and again assemble, but in that case, the judgment would probably be a voidable judgment. In other words the supreme court would doubtless reverse a judgment of that kind, but it would not be a void judgment, because he consented—he was instrumental in permitting the court to commit that error, and the court of review would not say that that judgment was void, because he was instrumental in

rendering it so, and therefore, would reverse the case and remand the prisoner for a new trial. But the court discharged the jury without the prisoner's consent, and that has enabled him to plead his former jeopardy, and as I said before, inasmuch as the state's attorney has well said that if nothing is left to do in this case except to put the man upon trial—admitting that the supreme court would reverse the case, as it undoubtedly would, and nothing was left to do except to put this man on trial again, so as to plead his former jeopardy, that the state will not put him to the trouble of going through that idle formality, and hence this court may as well discharge him as the supreme court.

Besides, let me say, that if I had any doubt about my position I would resolve that doubt in favor of the people. In cases of this kind where the matter of the guilt or innocence of the party is not involved, it is the duty of the court to resolve any doubt arising in favor of the people, because new evidence may be procured before the trial. So it is in this case, if I had any doubt about my position I would remand the prisoner, and compel him to sue out his writ of error in the supreme court, but, entertaining no doubt on the subject, my judgment is, that the prisoner ought to be discharged which is done accordingly.

(Recorder's Court of Chicago.)

People ex rel. William Green

vs.

Bradley, Deputy Sheriff, et al.

(April 11, 1870.)

1. **OFFICERS—DE FACTO—WHO ARE.** An officer *de facto* is one who has the reputation of being the officer he assumes to be and yet is not a good officer in point of law.
2. **SAME—THEIR ACTS—WHEN THEY CAN BE ATTACKED.** The official acts of a *de facto* officer are valid as to third persons who employ him until there has been a judicial determination that his

title is bad in law, except in cases where the *de facto* officer is himself sued for an injury inflicted on a third party, or where the third party knowing of the defective title should employ such an officer for a sinister purpose.

3. **SHERIFFS—ABSCONDING—EFFECT ON DEPUTIES.** Where a sheriff absconds with no intention of returning, while the deputy may perform duties as sheriff, yet he does so with many limitations, *e. g.* he cannot remove a jailor, because that is a discretion vested in the sheriff himself, and also many remedies given by law against the sheriff and his bondsmen are unavailing against the deputy in such a case.
4. **SAME—VACANCY—RELATION OF DEPUTY AND CORONER THERETO.** Under the law of Illinois when the office of sheriff becomes vacant for any reason, the rights of the deputy are not extended beyond the term of his principal, but the coroner becomes the successor of the sheriff until the vacancy is filled by an election as required by law.
5. **SAME—SUCCESSION OF CORONER TO OFFICE OF—JUDICIAL NOTICE.** When the occasion arises for the coroner to assume the sheriff's office, it takes no judicial proceeding to determine his right. It is a question of fact and if the office actually becomes vacant, and the coroner's right to the office is interfered with, he is entitled to the summary process of the courts, which always take judicial notice of their own officers.
6. **SAME—REMOVAL FROM COUNTY—VACANCY—CONSTRUCTION OF STATUTE IN REGARD THERETO.** The statute which provides "If any officer of a county shall remove from and permanently reside out of the same, his office shall be deemed vacant * * * " means that the office of any county officer becomes vacant whenever he leaves the county with no present intent of returning, and it does not have to be shown that he has actually taken up a permanent residence somewhere else. Such a removal is equivalent to a voluntary resignation.
7. **IMPRISONMENT—RIGHT TO HOLD PRISONERS WHERE SHERIFF HAS ABSCONDED.** The coroner and not the deputy sheriff is the person whose duty it is by the law of Illinois to hold a prisoner, where the sheriff has absconded.
8. **HABEAS CORPUS—PRACTICE—CASE WHERE RESPONDENT NOT ENTITLED TO HOLD PRISONER BUT SOME OTHER PERSON IS.** A prisoner while entitled to *habeas corpus* under the Illinois statute when he is held by an officer not entitled to do so will not be discharged when this fact is shown but will be turned over to the proper officer; so in the present case the prisoner will be taken out of the hands of the respondent, a deputy sheriff, whose principal has absconded, and put into the hands of the coroner.

Petition for habeas corpus. Heard before Judge McAllister. The facts are stated in the opinion.

Francis Adams, for the relator.

Sidney Smith, for Conrad Foetz, acting jailer.

Charles H. Reed, state's attorney.

MCALLISTER, J.:—

The habeas corpus act of this state contains the following provisions applicable to this case: "If it appear that the prisoner is in custody by virtue of process from any court *legally* constituted, he can be discharged only for some of the following causes:" enumerating seven distinct heads, under the fifth of which is this: "Or when the person having the custody of the prisoner *under such process, is not the person empowered by law to detain him.*" Our statute is broader than that of any state or country of which I have any knowledge, and the provision just quoted was, no doubt, dictated by the spirit of an advanced civilization, and founded in a policy springing from the teachings of history: that it is far better than even persons guilty of crime should escape than that they should be subjected to the power of irresponsible keepers.

The theory of the relator's counsel is, that respondent was at first but the mere bailiff of Gustav Fischer, late sheriff; that long anterior to relator's commitment Fischer absconded from the state with the manifest intention of not returning to the same, which was a matter of public notoriety, and especially known to respondent; and that by the statutes of this state the coroner who had demanded the possession of the jail, was *ex officio* sheriff, and the authority of the respondent superseded; and, that, therefore, he is *not the person empowered by law* to detain relator. The counsel for respondent replies that he is an officer *de facto*, and all his acts are valid and legal. As the habeas corpus act requires his discharge if the prisoner is detained by a person *not empowered by law* to do so; and as it is essential to the very idea of an officer *de facto* that he is not a good officer *in point of law*, there is great difficulty in the question, and in fact there are other questions involved, which require for their investigation, time

and befitting opportunity, which the pressing and distracting nature of my duties will not allow.

It has been argued with much plausibility, that the expression, "the person empowered by law to detain him," necessarily means a good officer in point of law—an officer *de jure*—such an officer as may enforce any necessary and proper discipline with a legal justification on the part of the officer and without any for resistance on the part of the prisoner, and that, as the court is clothed with the power by the habeas corpus act to determine the main question, it may also determine all of the incidents.

As it will happen that persons assume to act, and are reported to be public officers, when they are not good officers in point of law, and third persons and the public will employ them, a rule of public policy, founded in consideration of preventing a failure of justice, has been adopted, and such third persons are presumed to be ignorant of the existence of the matters which in point of law render them not officers *de jure*—not legally invested with the office. While the acts of such *de facto* officers are held valid as to third persons, or the public, thus presumed to be ignorant of their defect of title, the same principle cannot apply when the officer *de facto* is himself sued for an injury to third persons; nor would his acts be valid as to any third person, who, having full knowledge of his defect of title, should employ him for any sinister purpose. If Gustav Fischer had absconded with the manifest intention of never returning to this state, and that act, under the statutes of this state, rendered his office vacant, by force of the statute itself, and if respondent knew the fact, then, even conceding that he was an *officer* originally, and, as to third persons presumed to be ignorant of the fact, to be regarded an officer *de facto*, he could not, if indicted or sued for false imprisonment preclude inquiry into the facts which defeated his title. His acting as such would be *prima facie* evidence that he was such officer, but only *prima facie* and subject to be rebutted. *Commonwealth v. Fowler*, 10 Mass. 290; *Courser v. Powers*, 34 Vt. 517, 1 Am. Law Reg., New Series, 268.

The law on this subject is perfectly harmonious. It holds

that when a person, under color of authority, acts and is reputed as a public officer, then as to all third persons, or strangers, as it is sometimes expressed, he will be deemed an officer *de facto*, as to such third persons or strangers his acts will be valid and cannot be impeached collaterally, unless there has been a direct proceeding against such *de facto* officer, or the person from whom he derives his authority, and in whose name he acts, in a court of competent jurisdiction, the facts judicially ascertained, and the proper judgment pronounced; then as everybody within the sovereignty from which the court derives its powers is chargeable with notice of such judgment, the presumption of ignorance of the defect of title ceases and the acts of such reputed officer are not valid, even as to third persons or strangers. It has been frequently said in reference to the acts of the deputies and bailiffs of the absconded sheriff, that they are *de facto* officers, and everything is precisely as well as if the sheriff had not so absconded. In my judgment, this is a mistaken idea of the matter. Their acts are valid to the extent I have indicated. It would be just as proper to say that a limb with a severe wound, and a surgeon's patch upon it, was just as good as a sound one. The very idea of a *de facto* officer is to cover a defect until soundness can be secured, and the unsoundness is implied in the term itself. The authoritative definition of such officer is that given by Ellenborough, C. J., in the case of *King v. The Corporation of Bedford Level*, 6 East, 363: "An officer *de facto* is one who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law." The only case relied upon by counsel for respondent is that of *Ballance v. Loomis, et al.*, 22 Ill. 82, which, it is claimed, decides that the office of sheriff, although he may have absconded never to return remains the same in the hands of his deputies.

That was a case where the deputies were the reputed deputies of the abscondent and acted as such in levying an execution, and the court held that, until the office of sheriff was declared vacant by a direct proceeding against him in a court of competent jurisdiction, or until an election was held and

a successor elected and qualified, the acts of the deputies would be valid as to third persons who were presumed ignorant of the fact which superseded their authority. The supreme court do not say, in that case, that their acts were as valid as if the event had not happened—that they were good officers in point of law but say that “they were officers *de facto*, and while acting as such, their official acts will not be inquired into in a collateral proceeding, and all their acts must be held binding until the office of their principal was vacated by a direct proceeding.” This is familiar law, and all it means is, that third persons are not chargeable with knowledge of the defect of title, and are presumed to be ignorant of it until such direct proceeding is had. “But where it is for the benefit of strangers or the public *who are presumed to be ignorant* of such defect of title, it is good.”—Cro. Eliz., 69; *King v. Lyle*, Andrews R. 163; *Hipsbey v. Tuche*, 2 Levinz, 184; *Rodman v. Harcourt et al.*, 4 B. Monroe, 233.

But when our supreme court held deputies to be officers *de facto* when the sheriff had absconded, it used the term understandingly, and it is in effect saying that they were persons who had the reputation of being the officers they assumed to be, “and yet were not good officers in point of law.”

It will be apparent that in such case the public are deprived of very important rights in not having a sheriff or one who *ex officio* performs his duties and is subject to his liabilities. A deputy sheriff may perform the duties which the sheriff is required to perform. But there are many limitations. He cannot appoint a bailiff any further than to do a particular act. *Hunt v. Burrell et al.*, 5 Johns. 173. He cannot remove a jailor, because that is the exercise of a discretion vested alone in the sheriff. Neither could he appoint one. If, therefore, the jailor were ever so negligent, cruel, or oppressive, Mr. Bradley could not remove him. The summary remedy given by the statute to a party to an execution, against the sheriff or coroner for not paying over moneys collected cannot be enforced against the deputy. So as to the same remedy given to the county court or auditor of the state for not paying over taxes collected. He (the sheriff) is iden-

tified in contemplation of law with all his under officers, and is directly responsible in the first instance for all their acts done in the execution of process." 2 Greenleaf, Ev. sec. 480, and note 1.

The case of *Paddock v. Cameron*, 8 Cowen, 211, is much in point in showing how the public are exposed under this state of things, and who ought to perform the duties of sheriff. The statutes of New York were in many respects precisely like ours. This was an action on the case against the defendant, as under sheriff of the county of Warren, for a false return to a writ of *fi. fa.* It appeared on the trial, that the defendant was the under sheriff of Dudley Farlin, Esq., who (instead of absconding with a harlot) was, at the fall election of 1823, elected a member of assembly, and his office, therefore, vacated by statute, on the 1st of January, 1824. The defendant exercised the office of sheriff until a new one was elected in March, 1824. The *fi. fa.* was delivered to the defendant on the 23d day of January, 1824. A verdict was found for the defendant. A motion was made for a new trial on several grounds, and opposed on the ground, among others, that the defendant's office of under sheriff expired with that of Mr. Farlin, the sheriff. Woodworth, J., delivering the opinion of the court, said: "I do not consider it necessary to examine the question whether the evidence sufficiently establishes the fact of a false return; being of opinion that this action does not lie against the under sheriff. The general rule is, that an action will not lie against an under sheriff, for a breach of duty in his office, although he may, as well as any other agent, make himself personally responsible by a special undertaking. *Cameron v. Reynolds*, Cowp. 403; *Tuttle v. Love*, 7 Johns, 472. The inquiry then is, whether a case like the present is provided for by the statute? (1 R. L. 413, 420, sec. 5.) By this act, it is declared that the sheriff shall appoint an under sheriff, and in case of the death of the sheriff, the under sheriff shall in all things execute the office of sheriff until another sheriff shall be appointed; * * *

"The act farther provides that if there be no under sheriff at the time of the death of the sheriff, or if such under

sheriff shall die, or remove out of the county, or become incapable of executing the office before another sheriff shall be appointed, in every such case the coroner or coroners shall, in all things, execute the office of sheriff, until a sheriff shall be appointed and take upon himself the office. The act specifies only the natural death of the sheriff. That did not happen; and consequently, the defendant derived no authority, under this statute, to take the place of the sheriff. Whether the county, on the election of Mr. Farlin to the legislature, were left without any person to discharge the duties of sheriff, is not material to the point before us. It is enough that the defendant had no authority to act. *I incline, however, to the opinion that, by a reasonable construction of the statute, the right to discharge the duties of sheriff devolved on the coroners; inasmuch as one of the contingencies upon which this right depends is, that the under sheriff becomes incapable of executing the office. This event has taken place. Motion denied."*

And if there is any remedy against the bondsmen of the absconded sheriff, under the circumstances, what it is, is a matter of doubt and difficulty. And there is still another injury to the public. No one taking a false oath as to qualification of bail, before the deputy *de facto*, can be punished for perjury. We had just such a case last term, and the state's attorney, under direction of the court, dismissed the prosecution. On the authority of *Rex v. Verenet*, 3 Camp. 432, 1 Hawk P. C. ch. 69, sec. 4, holding that where the action of an officer was made the foundation of an affirmative criminal proceeding, although Mr. Bradley's acting as deputy was *prima facie* evidence, yet it might be rebutted, and his strict legal title inquired into. The truth is, that when the gearing is substantially disarranged, the harmony of the machinery must necessarily be broken.

We now recur directly to the question: Is the respondent the person empowered by law to detain the prisoner? And this, upon the theory of relator's counsel, requires us to consider the question whether the contingency has happened which renders the coroner *ex officio* sheriff, and, if it has,

whether the court is compelled to discharge the prisoner irrespective of his guilt or innocence. These are grave questions, and in which the public have great interest. After a careful examination of the statutes, I am satisfied that the contingency has happened which would authorize the county clerk to notify the governor of the fact of a vacancy in the office of sheriff, and, if that be so, what is the relation of the coroner to the office of sheriff? It is the manifest purpose of the several statutes on this subject to give us a complete system for the regulation of so important an office as that of sheriff, and to preserve the county from the inconvenience of an *interregnum* in the office, and which necessarily abrogates a part of the common law. And it is to be observed that there is only one case in which a deputy sheriff has his powers extended beyond that of his principal, and that is the case of death; in all others these powers devolve upon the coroner. The offices of sheriff and coroner are intimately blended. The very title of the statute is "Sheriffs and Coroners." Their official bonds are defined in the same section, and the coroner's first bond is conditioned for the faithful discharge of all the duties required or to be required of him by law, *as sheriff*, or coroner, and his official oath is for both offices. Writs are to be directed to him when the sheriff is interested, and he is to take possession of the jail when the sheriff is a prisoner in it. Then, in the eighteenth section of the same act is this provision: "In case a vacancy in the office of sheriff, by death, resignation, removal, *or otherwise*, the coroner shall do and perform all the duties pertaining to the office of sheriff, receive the proper fees and emoluments, and be liable to the same penalties and proceedings as if he were sheriff, until such vacancy shall be filled by the election and qualification of a new sheriff."

The object of this provision is, that the courts may always have a known chief executive officer; that parties to suits, taxpayers, the county and the state, may always have the benefit of those stringent remedies provided by law for the security of private and public moneys. And, we may ask, can any legal mind, contemplating all of these statutes, per-

ceiving their objects and purposes, arrive at the conclusion that the coroner cannot, when the contingency happens that by any provisions of law render the office of sheriff vacant, and the same becomes practically vacant, assume the duties of sheriff, without first having a direct proceeding against the sheriff, by information in the nature of a *quo warranto*, and have a court of competent jurisdiction to declare it vacant, requiring months, if not years of time? Conceding that jurisdiction could be obtained of an absconded sheriff, whose whereabouts were unknown (which is extremely doubtful, 44 Ill. 458), is any such idea fairly within the intention of the statute? In my judgment it is not. Because, then, the statute should read, "In case of a vacancy in the office of sheriff by *removal* of the incumbent," which would mean by direct proceeding. But this statute includes a vacancy by death (when there could be no judgment), by resignation, by removal, or *otherwise*, which includes every species of vacancy. It matters not that a fact is to be found. It would be so in case of death. It is easy to determine that a man is dead if we see his corpse; but suppose he dies at sea, or in a distant land among strangers. Then the fact is as difficult of proof as resignation or removing out of the county with intention to permanently reside out of the same. There is no regulation by statute as to how the sheriff shall resign his office. Every civil officer has the right to resign his office whenever he pleases. *United States v. Wright*, 1 McLean 509. He may resign it by parol. Suppose Gustav Fischer had decided to leave this state and go back to Germany to spend the rest of his life, and, before leaving, had taken deputy Bradley and respondent Folz to the office of the county clerk, and there told the clerk that he resigned his office, delivered his farewell address to his constituents, and left. Would it be necessary for the coroner to file an information to have the office vacated before he could assume its duties? Clearly not. Because it would not, in that case, be a vacancy by resignation, but by removal of the incumbent by judgment. If it be asked how the coroner is to get possession of the jail and the office if the deputies resist, I

answer, by the summary power of the courts, who are bound to take judicial notice as to who is their chief executive officer. "The court will, *ex officio*, take notice of it. A court is presumed to know its own officers and all public officers in civil affairs within its jurisdiction—*certainly the sheriff of its own court.*" *Thompson v. Haskell*, 21 Ill. 216. Then again: "Even if the court was not bound to take notice of the death of its chief executive officer, it was competent to receive proof of that fact and to decide upon such proof." *Timmerman v. Phelps*, 27 Ill. 196. It is the duty of the courts to see that their process, both *mesne* and final, should be directed to their chief executive officer, and to do so they have all the power of determining who he is. Nobody ever contemplated the contingency of a mere deputy setting up a right to any office. "A deputy has no interest in the office, but is only the *shadow* of the officer in whose name he does all things." *Jac. Law Dict.* title "Deputy." Suppose a new sheriff should be elected, and this bailiff or a deputy still refuses to surrender the office, and demand that the office of his principal should be first vacated by a direct proceeding, which could be kept off till the term expired, would the courts still place their process into his hands, and recognize his returns in the name of Gustav Fischer?

The statute provides that "If any officer of a county shall remove from and permanently reside out of the same, his office shall be *deemed vacant*, and such vacancy *shall be filled* as in other cases." "Deemed vacant," by whom? Not necessarily only by a court; but the meaning may be ascertained by the context, "and such vacancy *shall be filled* as in other cases." How is a vacancy to be filled in other cases? The statute furnishes the answer, "That whenever a vacancy shall happen in the office of sheriff, etc., by death, resignation, or removal of the incumbent, it shall be the duty of the clerk of the county immediately to notify the governor *of the fact*, and it shall be the duty of the governor to issue a writ of election to fill such vacancy."

And here we may also remark that if it had been the intention of the legislature to confine the county clerk to only the

case of a removal by direct proceeding, the words *removal of the incumbent* would have sufficed; but the words by death, by resignation, are also included, which render such a construction unreasonable and against the plain meaning of the statute. Then, to make the system complete, and to secure to the courts a chief executive officer, and to protect private parties and the public, comes in the other provision, making the coroner *ex officio* sheriff “until such vacancy shall be filled by the election and qualification of a new sheriff.”

Now, what is the fair meaning of the statute above quoted in reference to county officers removing out of the county? The object is apparent, and that was simply to secure the residence of county officers, not only in the state, but in the county where they were elected, that they might be subject to the penalties and proceedings provided by law, and I am satisfied, from a careful consideration of these objects, that if a county officer absconds from the state with the intention (which is to be inferred from the circumstances) of never returning to it, then the contingency has happened which renders his office vacant, and the public are not bound to wait until he becomes permanently settled elsewhere. Suppose he commits a murder and manages to escape to Canada, are the authorities of the county bound to wait until his haunted conscience will permit him to find a resting-place? Why should there be such tenderness exhibited towards an absconding public officer who has proved so wickedly recreant to a sacred public trust—to his duties to family and society? The evidence in this case leaves no shade of doubt in any reasonable mind, and, indeed, it is a matter of public notoriety, that Gustav Fischer, on the 15th day of December last, absconded from this state under such circumstances as preclude the idea of his ever returning to it. Suppose he had been a defaulter to the amount of fifty or a hundred thousand dollars and absconded, or suppose he had committed a highway robbery and escaped, would there be any doubt of his intention of keeping away from here? For the sake of the public morals, I forbear the rehearsal of the evidence in this case. He had thoroughly outraged and ruptured his family relation. He had

squandered his means upon a harlot, with whom he eloped, and was hopelessly insolvent. He told various false and conflicting stories, as to where and for what purpose he was going. He obtained large sums of money by fraud. He deceived and defrauded his best friends into signing his paper, and thus betrayed their confidence. His return to this state is simply impossible, if he is sane, and he is, it is to be so presumed.

The effect of such voluntary removal is a virtual or constructive resignation of his office. In *Ferguson v. Lee*, 9 Wend. 258, where there was a similar statute, a deputy sheriff removed into another county. Savage, Ch. J., says: "In this case Haddock, who had made the levy as under sheriff of Herkimer, had, intermediate the levy and sale, removed to Oneida county. This was a *virtual resignation* of his office; it was a voluntary withdrawal from the county, which, by the statute, *vacated his office*." Not by the judgment of the court on information in the nature of a *quo warranto*; but "by the statute."

In the case of the *State v. Allen*, 21 Indiana, 521, the court says: "An office may be vacated, be abandoned, which is *constructive* resignation. An office may be resigned by parol, and, of course, *acts* may speak that resignation." Also, *Bernard v. Hoboken*, 27 N. J. L. 412.

That the respondent knew the facts which constitute such virtual resignation is manifested by the very clearest evidence, viz., the sealed articles of agreement of the 26th of January, 1870. I have not space to present an analysis of these articles, but suffice it to say they are virtual administration of the estate of Gustav Fischer, and are based upon a clear assumption that he had absconded not to return. They recite the fact of his having left, and of the refusal of his bondsmen to be further bound; they are *tri partite*. The parties of the first part are twenty-three creditors of Fischer, among whom is respondent, representing \$34,128.90 of indebtedness against him. The parties of the second part are the bondsmen, and of the third part T. M. Bradley and W. F. Wentworth. They assume to take possession and control,

not only of the office, but of all of Fischer's estate, Schedules of assets and liabilities, formal enough for the probate court, are carefully prepared and made a part of the articles signed by Bradley Wentworth and John Mattocks. Among the items of assets is the following: "Estimate of office for ten months, \$15,000." Bradley is to be the chief administrative agent. This may be an ingenious manner of collecting bad debts, but it manifests some indifference to the rights of the public and the law of the land, and looks very much as if it was against public policy. But these are the very parties who now insist that nothing has happened which warrants a court in finding that Fischer has absconded with the intention of not returning. Mr. Bradley says he did not sign these articles. But he did sign the schedules. He is named in them as a party, and had them in his possession at the time of the hearing.

Whom, then, is the court, under the evidence and authority of our supreme court, to regard as its chief executive officer? Gustav Fischer, who has absconded and had his estate extra judicially administered upon by the very parties who resist this application; or is it the coroner, whom the law designates as the proper officer to perform the duties of the office, and be liable to the penalties and proceedings as if he were sheriff, until one shall be elected? I have no hesitation in saying it is the latter.

Respondent cannot be considered an officer *de facto*, because he is not a general public officer, but the mere agent and special officer of the late sheriff. In *Dake v. Sykes*, 7 Term, 117, Lawrence, J., says: "The admission of the under sheriff may affect the high sheriff, because he is the general officer of the sheriff; but I do not think that the bailiff is his general officer. When a warrant is granted him, he becomes the special officer of the sheriff, and I have always understood it to be necessary to produce the warrant to show the relation." Crocker on Sheriffs, 11. He takes no oath and is required to give no bond. *King v. Bedford Level*, 6 East, 356.

The court is required in this proceeding to determine who

is the person empowered by law to detain the prisoner; and to do so it is necessary to determine whether the former relations between him and Fischer have not been dissolved. I am satisfied that they have been. If the court has no power to determine this question in this way, then an unauthorized keeper of a jail could always keep possession. Proceedings *quo warranto* would not lie against him, because he is a mere agent or special officer. If the relation has been dissolved, then he has no authority. *Boardman v. Halliday*, 10 Paige, 223; *Edmunds v. Barton*, 31 New York, 495. The practice is where a prisoner is detained by one not authorized by law to detain him, and there is another person who is, to remand him to the custody of the one so authorized. The prisoner is accordingly remanded to the custody of the coroner.

(Circuit Court of Cook County. In Chancery.)

The North Chicago City Railway Co.

vs.

The Town of Lake.

(1880.)

1. **EQUITY—JURISDICTION OF—PREVENTING ENFORCEMENT OF VOID ORDINANCE.** Equity has jurisdiction to restrain the enforcement of a void municipal ordinance imposing duties upon a street railway company where the damage is unascertainable and irreparable and the rights and convenience of the public are involved.
2. **ESTOPPEL—WHEN MUNICIPAL CORPORATION NOT ESTOPPED TO REVOKE LICENSE.** No equitable estoppel arises to prevent a municipal corporation passing an ordinance revoking a former license from the fact that the licensee, a street railway company, has expended a large amount of money and helped build up the municipality, while acting under the license.
3. **ORDINANCES—MUST BE GENERAL IN NATURE.** An ordinance is invalid which on its face is aimed at and applicable to one corporation, and no other corporation or company whatsoever.
4. **NUISANCES—POWER OF MUNICIPALITY TO DECLARE—PROVINCE OF COURTS.** The mere declaration of a municipality that the use

of steam power by a street railway company is a nuisance does not make it such, as it is not *per se* a nuisance. Whether it is under the circumstances a nuisance is a subject for judicial inquiry and determination.

5. ORDINANCES—UNREASONABLENESS—HOW TO BE SHOWN. The unreasonableness of an ordinance should be shown upon proofs and not upon affidavits.
6. TOWNSHIPS—EFFECT OF GENERAL TOWNSHIP ACT OF 1874 UPON FORMER SPECIAL TOWNSHIP ACTS—QUAERE. Whether the general law of 1874 regarding townships did not repeal the former special act giving certain officials of the town of Lake View the right to act as a board of trustees for that town—*quaere*.
7. MUNICIPAL CORPORATIONS—VOID ORDINANCES—LIABILITY FOR ENFORCEMENT OF. A municipal corporation is not liable for the damage which may result from the enforcement of a void ordinance.
8. SAME—WHERE AND HOW TO BE TESTED—NATURE OF INJUNCTION. The ordinance in this case should be tested in a court of law, not, however, by daily or hourly arrests which may destroy complainant's property with no chance of redress, but the town will be restrained from bringing more than three law suits until a final decision is reached as to the validity of the ordinance.

Motion for an injunction. Heard before Judge M. F. Tuley. The facts are stated in the opinion.

W. C. Goudy, for complainant.

M. W. Robinson, for defendant.

TULEY, J. :—

This is a bill filed to restrain the town of Lake from arresting, or causing to be arrested, the engineers, conductors, etc., of the railway company's cars propelled by steam in the town of Lake, under a certain ordinance passed by the trustees of said town in October, 1880, declaring that the use of steam motive power to propel any street car upon or along any highway in the town after the 15th of October, 1880, should be deemed a nuisance and that any engineer, conductor, etc. of any such car using steam power should be considered and adjudged guilty of committing a nuisance.

The bill alleges that the company acquired the right to lay down its tracks and to use steam thereon by the lawful

consent of the supervisor, James H. Rees, given in 1861 and 1863, when the town was sparsely inhabited, and that the company at great expense laid down and has maintained its railway through certain highways, extending from the North Chicago city limits to the Graceland cemetery, which was the objective point in the construction of the said railway in said town.

It is alleged that the railway is so constructed that horse power cannot be used, and that the enforcement of the ordinance would destroy the property of said company in said highways and produce irreparable injury. The ordinance is attacked as illegal and as an abuse of discretion by the corporate authorities.

The question as to the jurisdiction of a court of chancery to grant an injunction against corporate authority to enjoin the enforcement of the town ordinance is raised by the defendant and is one of considerable difficulty upon the authorities. It is an objection which I always receive favorably and duly consider, as I believe that I am not at all inclined to draw to this court any unwarranted or doubtful jurisdiction. I am of the opinion that this court has jurisdiction for the following, among other reasons. There is a large amount of property involved which will suffer a damage that can never be accurately ascertained by reason of the enforcement of the ordinance. The amount of travel that will be lost or the effect that discontinuing the connection of the Lake View tracks with the city tracks will have upon the travel on the railway within the city can not be determined by any known rules. In other words, the injury is to some extent irreparable. Again, where the party to be injured is a common carrier of persons and the rights and conveniences of transit of the public are involved, a court of equity should interfere to prevent the enforcement of a void ordinance. While it is true that the invalidity of the ordinance itself would be no ground for equitable interposition, I think the invalidity taken in connection with the grounds before stated do make a case giving jurisdiction to a court of equity.

The complainant contends that the company having exercised the franchise for so many years and having invested a large amount of money upon the strength of the license given it by the supervisor and having by so doing largely contributed to building up the town, there is an equitable estoppel upon the corporation and it should now be enjoined from enforcing an ordinance which will cause the company such great loss. I can perceive no force in the argument as to an equitable estoppel against a municipal corporation. I think the only question is this: Is there good grounds for doubting whether the passage of the ordinance and the enforcement of it is a valid exercise of corporate power? The ordinance is a very peculiar one, bearing evidence upon its face, I think, that it is designed and intended to apply to the complainant railway only. Section one named the railway and prohibited the use by it of steam motive power and section three prescribes penalties for so doing. Section two, while apparently general, yet when taken in connection with sections one and three, it is apparent that the entire ordinance is aimed at the complainant company and no other company or corporation. It needs no authority to be cited to show that the corporate authorities can not pass ordinances applicable upon their face to a single individual or corporation. All ordinances must be general in their character and must apply alike to all persons and corporations within the corporate limits, all, at least, of the like class, or they are invalid.

The ordinance is claimed to be bad also because in derogation of the grant made by the supervisor to the complainant. This position is not tenable. There appears no grant which will interfere with a valid exercise by the town of the power to regulate the use of streets. It is claimed that the ordinance is void as it undertakes to declare what shall be a nuisance and declares that to be a nuisance, to-wit, the use of steam power, which is not a nuisance *per se*. What is or is not a nuisance as to the use of steam power must necessarily depend upon the facts in each particular case. The use of steam power may possibly be a nuisance in one neighborhood

and not in another. The mere declaration by ordinance that the use of steam power is a nuisance cannot make it such. Whether it is a nuisance must necessarily, in a case of this character, be the subject of judicial inquiry and of judicial decision.

The ordinance is also claimed to be unreasonable because it is unnecessary; that but few could derive benefit from it, while a great many would be inconvenienced and injured by it. This is a question which should be determined upon proofs, not upon affidavits. I doubt very much, taking the allegations of the bill in that regard as true, whether there is shown any wanton, wilful or oppressive exercise of the discretion and power by law vested in the trustees.

The bill attacks the power of the officials of the town of Lake View to act as a board of trustees and pass any ordinances whatever. If that question can be raised in this case, in this collateral manner, it would of itself give strong grounds for the granting of this temporary injunction. It is a very serious question and one that should be determined at the earliest possible moment. The town supervisor, assessor and commissioners of highways, by special act before the adoption of the constitution of 1870, had power conferred on them to act as a board of trustees. The new constitution commands the legislature to provide by general law for township organization, and prohibits special legislation in township matters. It is contended that the legislature having in 1874 passed a general law in regard to township organization, all special laws on that subject, among them that conferring the powers of a board of trustees upon the town officers of Lake View, stood repealed because they are inconsistent with the general law. The judicial mind will see at a glance that there is much force in the position. It is not necessary now for me to pass upon the point.

If the town of Lake View would be responsible for the damages which would result from the enforcement of this ordinance, I should feel inclined to refuse this injunction, but under the late decision in the case of *City of Chicago v. Turner*, 80 Ill. 419, there would be no liability attaching to the town if the ordinance is invalid.

The company ought not to be forced to seek indemnity from petty police officers or impecunious town constables for the great losses it will suffer by the enforcement of this ordinance. I am of the opinion that this ordinance should be tested in a court of law, but not by daily or hourly arrests which would destroy complainant's property and largely inconvenience the traveling public. The town should be permitted to bring at least three suits to test this ordinance, if it should insist upon the enforcement, but should be restrained from any further interference with complainant's railway and its present use thereof, until there is a final decision by the law courts as to the validity of the ordinance, and until the further order of this court.

Let the order for an injunction be so drawn.

NOTE.

The same ordinance was before the supreme court in *North Chicago City Ry. Co. v. Town of Lake View*, 105 Ill. 207, and it was there held that the town of Lake View had the power to declare the use of steam power in the streets a nuisance and the courts could not go behind this declaration.—Ed.

(*Superior Court of Cook County.*)

The People of the State of Illinois ex rel. William A. Bartlett, A. Lincoln Shute and Robert J. Bennett

vs.

Edward F. Dunne, as Mayor of the City of Chicago, and Michael Kenna.

(January 8, 1907.)

PLEADING—IRRELEVANT, IMPERTINENT AND IMMATERIAL MATTER—MOTION TO STRIKE. Where a pleading contains improper, irrelevant, or impertinent matter, the proper practice is to file a motion to strike.

(January 30, 1907.)

MOTION TO STRIKE—PETITION FOR MANDAMUS. Where a petition for *mandamus* contains irrelevant, argumentative and repug-

nant matter, and matters of evidence, none of which enabled the petitioners to introduce any evidence which could not be introduced in the case without such allegations, a motion to strike should be sustained.

Petition for mandamus. Motions of defendants to strike out certain portions thereof. Motion of relators to strike motions to strike from files. The portions of the petition to which the motions to strike were addressed appear in italics in the statement of facts. Heard before Judge Axel Chytraus.

Gen. No. 258,128, Term No. 16,128.

Messrs Church, McMurdy & Sherman, and *Walter J. Miller*, for relators.

Levy Mayer and *J. Hamilton Lewis*, corporation counsel, and *Daniel P. Murphy*, assistant corporation counsel, for respondents.

STATEMENT OF FACTS.

The petition alleged the following:

Your petitioner, the People of the State of Illinois, upon the relation of William A. Bartlett, A. Lincoln Shute and Robert J. Bennett humbly complaining, represents unto your honors,

I.

That the relators above named are citizens of the city of Chicago, in the county of Cook and state of Illinois; *that they have resided in said city for more than one year last past, and that they are all interested in the peace and good name of said city and in the maintenance of law and order therein and in the cultivation thereby of a more general respect for the law, and that in particular they are interested in securing the observance of and obedience to the laws of the state requiring the closing, on the first day of the week, commonly called Sunday, of all tippling houses and places where liquor is sold or given away.*

II.

That heretofore, to-wit: at the regular election for mayor of the city of Chicago held in said city on the 4th day of April, A. D. 1905, Edward F. Dunne was duly elected as mayor of said city for the full term of two years; that afterwards, to-wit: on the 10th day of April, 1905, the said Edward F. Dunne took the oath of office, as mayor of said city, prescribed by section 4 of article VI of chapter 24, of the Revised Statutes of this state, and duly qualified as such mayor, and thereupon then and there entered upon the discharge of the duties of said office, and ever since has been and is now the mayor of said city.

III.

That there were heretofore duly enacted by the city council of the city of Chicago, certain ordinances of said city, hereinafter more particularly mentioned, which at the time said Edward F. Dunne assumed his office as said mayor were and still are in full force and effect in said city and which now form a part of the official compilation of the ordinances or said city made under the authority of the city council, known and designated as the Revised Municipal Code of Chicago of 1905, adopted by ordinance passed by said council March 20, 1905, and then and there duly approved by the then mayor of said city and afterward, to-wit: April 15, 1905, printed and published in book form by and under the authority of the said city council of said city; which ordinances, as hereinafter referred to, will be designated by the section numbers of said Revised Code, to-wit:

Section 1731. Establishes an executive department of the municipal government of said city which shall be known as the department of police and shall embrace the general superintendent of police, an assistant general superintendent of police, a secretary of the department of police, a private secretary to said general superintendent, one inspector of police for each police division, one captain of police for each police district and such number of lieutenants, detective ser-

geants, patrol sergeants, desk sergeants, patrolmen and other employees as may be provided by ordinance.

Section 1732. Creates the office of general superintendent of police to be appointed by the mayor by and with the advice and consent of the city council.

Section 1737: Prescribes that the general superintendent shall devote his whole time to the municipal affairs of the city, to preserve the peace, order, safety and cleanliness thereof and to this end shall execute and enforce all ordinances and orders of the city council and the orders of the mayor.

Section 1740: Provides that said general superintendent shall from time to time divide the city into police divisions, districts and precincts and assign inspectors, captains and lieutenants of police respectively, to such divisions, districts and precincts and that all regulations and orders of the department of police shall be promulgated through the general superintendent.

That in pursuance of the foregoing ordinances general superintendents of police have from time to time been appointed by the respective mayors of the City of Chicago, the other officers and members of the said police force prescribed thereby have also been appointed, the said city divided into police divisions, districts and precincts, to-wit: five divisions, fifteen districts and forty-four precincts, and a large police force established and created, including a general superintendent, an assistant general superintendent and five inspectors, fifteen captains, forty-four lieutenants, assigned and distributed in accordance with said ordinances, and a large number, to-wit: Three thousand sergeants, patrolmen and other officers and employees.

That at the time the said Edward F. Dunne assumed the duties of the office of mayor of the City of Chicago, as aforesaid, there was and still is in said city, engaged in the active performance of its duties therein, such police force as is above described, with a general superintendent and the various other officers, patrolmen and employees aforesaid, and that shortly after assuming the duties of the office of said mayor

as aforesaid, the then general superintendent of police having resigned, the said Edward F. Dunne, in pursuance of the authority conferred upon him by said ordinance, did, by and with the advice and consent of the city council of said city, appoint a general superintendent of police, who ever since has been and now is holding and exercising the duties of said office under the direction of said mayor.

IV.

That before and at the time when said Edward F. Dunne assumed as aforesaid his duties as mayor of said city, there were and ever since have been and are now in full force and effect in said city, certain *other* ordinances of said city, now comprising part of the said Revised Municipal Code of 1905, hereinabove mentioned, to-wit: (reference being made thereto by the section numbers of said code as aforesaid):

Section 1336, which provides for the granting by the mayor of said city, of licenses for the keeping of saloons or dram-shops within said city upon certain conditions therein prescribed.

Section 1337, which prescribes among other things, that no license for the keeping of any saloon or dram-shop shall be granted unless the applicant for such license shall agree in such application to comply with all the regulations and conditions imposed by the laws of the state of Illinois, and the ordinances of the city in force at the time of making such application, or that may thereafter be passed, relating to or concerning in any manner saloons or dram-shops, the conduct, management and maintenance of same and the sale or disposal of intoxicating liquors, and shall also agree in such application that if the mayor shall be satisfied that at any time during the period of such license any such liquor is being so sold, served or given away in such saloon or dram-shop contrary to and in violation of the agreements made in such application, in such case the mayor may forthwith revoke such license, and that the license fee paid therefor shall be forfeited to the city.

Section 1338, which is as follows: Every place where spirituous, malt, vinous or intoxicating liquor of any quantity whatsoever is sold, given away or otherwise disposed of in quantities of less than one gallon, whether consumed, or to be consumed, upon the premises or not, and whether sold, given away or disposed of in any grocery store, department store, liquor store or other place whatever, shall be deemed and is hereby defined to be a dram-shop, and is hereby required to be licensed in accordance with the provisions of this article, and that no person shall keep, conduct or maintain any such place unless he be licensed so to do, in accordance with and pursuant to the provisions of this article.

(The words "this article" in the foregoing section, meaning article 1 of chapter XXXVI, of said code, of which sections 1336, 1337, 1338, 1339, and 1340, are a part.)

Section 1339, which provides that any person, on compliance with the aforesaid requirements and the payment in advance to the city collector of a license fee at the rate of five hundred dollars per annum, shall receive a license under the corporate seal and signed by the mayor and attested by the city clerk, which shall authorize the person or persons therein named to keep a dram-shop or saloon and to sell, give away or barter intoxicating liquors in quantities less than one gallon in the place designated in the license and for the period stated therein.

Section 1340, which provides that the saloon license year is divided into two periods as follows: from May 1 to October 31, inclusive, shall be known as the first period; from November 1 to April 30 shall be known as the second period, and that licenses may be issued for the full license year or for the unexpired portion thereof, or for any period or the unexpired portion thereof.

Section 1324, which is as follows: In all cases where licenses are required to be procured, such licenses shall be granted by the mayor, attested by the city clerk, except where provision is expressly made for the granting of licenses by some other officer of the city. The mayor shall also have power to revoke for cause, any license granted by him.

V.

Your petitioner says that on or about November 1, 1906, Michael Kenna was by the mayor of said city of Chicago granted two licenses for the keeping of a saloon or dram-shop within said city in one of which said privilege was granted for the premises known as number 279 South Clark street and in the other of which such privilege was granted for the premises known as number 300 South Clark street, both in said city of Chicago, from the period beginning November 1, 1906, and ending on April 30, 1907, and that under said licenses said Kenna has been keeping a saloon or dram-shop and tippling house at both of said places and which said licenses are still in force.

VI.

And your petitioner further shows that in the conduct and operating of said saloons or tippling houses by said Kenna ever since the issuance of said license the law of the state of Illinois, prohibiting the keeping open of tippling houses and other places where liquor is sold or given away, upon the first day of the week, commonly called Sunday (hereinafter referred to as the Sunday closing law, by which name said law is commonly known and designated) has been and is habitually, openly and notoriously violated and disregarded by him *and that no pretense is made by him of obeying or observing said law*, but said saloons are habitually kept open and in full operation, and intoxicating liquors are therein sold and dispensed *as freely and openly on Sundays as upon other days of the week* and that no attempt whatever has been or is made by said Edward F. Dunne as mayor of said city, either by or through the *said* police department of said city or in any other way, to enforce or compel the observance of the said law or to prevent the violation thereof by said Kenna, or to punish or secure his punishment for violating the same, either by revocation of his licenses or in any other manner, *and petitioner charges that it is the intention of said Kenna to continue to and that he will dis-*

regard and disobey said law in the operation by him of said saloons as long as he is permitted by said mayor to do so.

VII.

And our petitioner shows and charges specifically that the said Edward F. Dunne, during the course of his campaign for election as mayor of said city, openly and publicly declared to the people of the City of Chicago, and especially to the voters thereof, that if elected to the office of mayor of said city he would not enforce the said Sunday closing law, nor take any steps or measures to compel the observance thereof; that said declaration was made as a campaign pledge or promise after a similar declaration had been publicly made by his chief opponent, a rival candidate for said office; and that since that Edward F. Dunne has entered upon the duties of his said office he has on several occasions openly and publicly repeated said declaration either directly or by specific reference to his said previous declaration; that on several occasions since his election many citizens of Chicago, individually and as delegations or representatives of various civic organizations in said city interested in the welfare and good order thereof, have called upon him and requested him to enforce said Sunday closing law, and that on every such occasion he has refused to do so, either expressly or by reference to his said previous declaration; and your petitioner shows in particular that heretofore, to-wit: on the 11th day of September, 1905, relator William A. Bartlett with several other citizens of Chicago called upon said mayor and requested him to take measures for enforcing said Sunday closing law and inquired of him as to his intentions in that behalf, and that said mayor in reply to such requests and inquiries, then and there referred to the said declaration made by him as aforesaid during his said pre-election campaigning, saying that he had then stated his position on the question clearly and that he saw no reason now why he should change his position.

VIII.

And your petitioner shows and charges that the said mayor has had full notice and knowledge of the said open and no-

torious habitual violation of said Sunday closing law by the said Michael Kenna, that he has full and ample means through the police force of said city, of ascertaining and keeping informed of such violations of said law, and full power and authority to enforce the observance thereof by said Kenna and to punish and secure his prosecution and punishment for violating the same and that his failure to execute said law and to compel the observance thereof by said Kenna is not because of any lack of knowledge on his part of such violation of said law, nor because of any lack of means or power or authority on his part to compel the observance of said law by said Kenna or to punish and cause him to be punished for his said violations thereof but because, as your petitioner is informed and believes and charges and as clearly appears from his declaration aforesaid, it is his deliberate intention not to take any action in the matter of compelling the observance of said law, or preventing its violation, or punishing or causing to be punished the violators thereof, and because he is willing and intends to permit said Kenna to continue openly and publicly to disregard and violate said law, and to habitually keep his saloons or tippling houses open on Sundays. And your petitioner alleges that, unless compelled by the mandate of this court to perform his duty in that regard, the mayor will hereafter continue to permit said Kenna wholly to disregard said Sunday closing law, and habitually to keep his said saloons open and to dispense liquors therein on Sundays, and will wholly fail and refuse to perform his duty in that regard or to take any steps or measures to compel obedience by said Kenna to the said Sunday closing law of this state or in any wise to prevent or punish or prosecute him for the violation thereof.

That on the thirteenth day of December, 1906, the following notice and request in writing was given to said Edward F. Dunne as mayor as aforesaid, viz:

"Chicago, December 13, 1906.

"To the Honorable Edward F. Dunne,

"Mayor of the City of Chicago,

"City Hall, City.

"We respectfully call to your attention the fact that the

saloons or dram-shops of Michael Kenna at Number 279 South Clark street and at Number 300 South Clark street, in said city of Chicago, are and have been for six weeks and more last past operated under licenses issued to said Kenna in his name; that said saloons or dram-shops are tippling houses; that said tippling houses are habitually kept open on Sunday and each and every Sunday contrary to the laws of Illinois.

"As you are aware, the statute of this state imposes a penalty on everyone keeping such a place open on Sunday, thereby making the act unlawful, and we respectfully urge and request you, as mayor of this city, charged by law with the duty of seeing that the laws are obeyed, to enforce this statute against said Kenna and to compel his obedience thereto by such means as are at your command.

"In this regard we call your attention to the fact that in other cities where the Sunday closing law has been enforced, a large decrease in crime has been shown by the public records and a great change for the better in the matter of peace and good order has resulted.

"We assume to make this request, also, in behalf of the wives and families of the laboring classes, many of whom are now compelled to endure a life of hardship on account of the open Sunday saloon, which not only absorbs a large proportion of the weekly wage but also deprives them of the companionship of husband and father on the only day of the week on which such companionship is possible.

"A. Lincoln Shute,

"Walter J. Miller,

"Respectively the chairman and secretary of the Executive Committee of the Sunday Closing League."

but that notwithstanding said notice and request, both of said saloons were kept open on the next succeeding Sunday, to-wit: on the sixteenth day of December, 1906, and intoxicating liquors were freely and openly sold and dispensed therein without interference by the said mayor or the police of said city.

IX.

And your petitioner further shows and charges that not only does such failure and refusal on the part of the mayor constitute a neglect and violation by him of the duty imposed upon him by law, but that his declarations that he would not enforce the said Sunday closing law are in effect an invitation to the violation thereof, and greatly tend to promote and encourage in the community a spirit of lawlessness and of want of respect for the laws of the state and for those who as public officials are charged with the administration thereof, and that by reason of the premises, the peace, good order and morals of the city of Chicago are greatly impaired.

X.

That because of the interest of said Michael Kenna in the event of this proceeding, he is made a party defendant thereto.

Wherefore your petitioner prays that this court issue its writ of mandamus against the said defendant, Edward F. Dunne as mayor of the city of Chicago and his successors in office, enjoining and commanding him and them without delay, and by the use, so far as may be necessary for the purpose of every means, power and authority in that behalf conferred upon the mayor of said city by the law of this state or the ordinances of the city of Chicago to proceed, and thenceforth to continue to enforce against said Michael Kenna as the proprietor of said saloons at numbers 279 and 300 South Clark street in said city of Chicago the statute of this state prohibiting the keeping open upon the first day of the week called Sunday, of tippling houses and other places where liquor is sold or given away (commonly called the Sunday closing law) by closing or compelling him to close and keep the same closed on each and every Sunday thereafter and in case of his refusal to obey the law in that behalf to secure his prosecution therefor and to punish such violation of said law by the revocation of his licenses; and that such other and further order may be made in the premises as the court shall deem just and necessary.

The affidavits of the relators are attached to the petition. The respondents each filed a motion to strike from the petition those portions thereof which are indicated by italics. The grounds of the motions were as follows:

(a) That each of said portions of said petition respectively consists of allegations of matters of evidence and does not present issuable allegations of fact.

(b) That each of said portions of said petition respectively consists of allegations of items of evidence or of mere statements of evidence.

(c) That each of said portions of said petition respectively consists of inferences of law drawn from the facts or matters of evidence alleged.

(d) That each of said portions of said petition respectively consists only of conclusions of law.

(e) That each of said portions of said petition respectively contains only an allegation or allegations of law.

(f) That each of said portions of said petition respectively is irrelevant.

(g) That each of said portions of said petition respectively is immaterial.

(h) That each of said portions of said petition respectively is surplusage.

(i) That each of said portions of said petition respectively is impertinent.

Thereafter the relators filed a motion to strike from the files respondents' motions to strike. On January 8, 1907 this motion was denied, the court rendering the following opinion:

CHYTRAUS, J. (orally):—

I am of the opinion now, as I have been all along, the proper practice is in any state where the common law prevails, to reach matter that is immaterial or improper, is by motion to strike out. It is, in my judgment, the best and most orderly way by which to reduce pleadings to a single issue, or reduce questions to a single issue.

This case of the *Chicago & Eastern Illinois Railroad Com-*

pany v. O'Connor, 119 Ill. 586, while to an extent it sustains the contention of the petitioner here, yet I don't think it is an authority in point. It appears that the supreme court there made a remark as to what the proper practice was, without reference to any authority at all, and then the remark was very much modified by the language that follows, where the court says that there was no prejudice by the procedure followed. These other cases cited by Mr. Mayer, I think, are about of the same kind. I do not think in any one of them, so far as I have observed, the question was squarely before the court, that is, the particular proposition was not the one upon which the decision hinged. So I do not think that the old common-law practice has been changed or altered in respect to a motion to strike being the proper way in which to reach improper, irrelevant or impertinent matter, and the court holds accordingly, that is, the motion will be entertained. As to the merits of the motion in this particular case, I believe, and you gentlemen both agree, it will take some time to argue it, and you both want to be heard at length.

On the merits of respondents' motions to strike the following opinion was rendered January 30, 1907.

CHYTRAUS, J. (orally):—

I believe in the strict enforcement of the rules of pleading, as I believe in the strict enforcement of the laws of our state. The courts have nothing to do with the policy or with the wisdom of the laws; and, I doubt if the court has anything to do with the rules of pleading. The rules of pleading that require him to strike from the record irrelevant, argumentative and repugnant matter, I think are good rules of pleading. If any one of these averments were necessary to enable this petitioner to introduce any evidence or any line of evidence competent in a case of this character, then as to such averment the motion to strike out should be overruled; but I fail to notice that any one of these averments that are objected to would enable the petitioners to introduce any evi-

dence that could not be introduced in the case without it; so I feel obliged here to sustain the motion to strike out.

I feel that this is a case of great importance, and may involve fundamental propositions and constitutional matters, and I do not want you gentlemen on either side to believe for a moment that I regard the matter lightly, because I do not. This point has been very ably argued by competent counsel on both sides and I am disposing of it in this way because I think that is the way to dispose of matters; but, because I dispose of it immediately, I do not want you to think that I regard any of these matters trivial.

NOTE.

A motion to strike out is the proper method of ridding a pleading of impertinent, immaterial or irrelevant matter or that which is surplusage. *Siever v. People*, 45 Ill. 224, 227; *Burnap v. Wight*, 14 Ill. 301, 303; *Stover Mfg. Co. v. Millane*, 89 Ill. App. 532, 537; *Consolidated Coal Co. v. Peers*, 166 Ill. 361; 14 Ency. Pl. & Pr. 79 and note p. 80; 21 Ency. Pl. & Pr. 221. But see *C. & E. I. R. R. Co. v. O'Connor*, 119 Ill. 586.—Ed.

(Superior Court of Cook County.)

**People of the State of Illinois ex rel. William A. Bartlett,
A. Lincoln Shute and Robert J. Bennett**

vs.

**Edward F. Dunne, as Mayor of the City of Chicago, and
Michael Kenna.**

(March 13, 1907.)

1. **COURTS—DUTY OF WHERE JURISDICTION DOUBTFUL.** It is true that the court will not take jurisdiction if it should not, but it is equally true that it must take jurisdiction if it should. The court has no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given.
2. **STATUTES—REPEAL BY IMPLICATION.** There must be a very clear implication and an inconsistency before the court can declare that a statute is repealed, where there is no express declaration to that effect.

3. SUNDAY CLOSING LAW—REPEAL BY CITIES AND VILLAGES ACT. The act which prohibits the opening of saloons and dramshops on Sunday was not repealed by the Cities and Villages Act which authorizes cities and villages organized under such act to regulate the liquor traffic.
4. REPEAL—SUSPENSION OF STATE LAW. There is no difference between a repeal by implication and the suspension of a state law in a particular locality by the adoption of a later law.
5. SUNDAY CLOSING LAW—IN FORCE IN CHICAGO. The state law prohibiting the sale of intoxicating liquors on the Sabbath day is applicable to and in force in the city of Chicago.
6. PRACTICAL CONSTRUCTION—AS TO REPEAL OF LAW. The fact that the city authorities of a city for a number of years had permitted saloons to keep open on Sundays is not sufficient to establish that a state law prohibiting the opening of saloons was not in force in such city.
7. MANDAMUS—TO COMPEL PERFORMANCE OF OFFICIAL DUTY IN EXERCISE OF POLICE POWER—ENFORCEMENT OF CRIMINAL LAWS. *Mandamus* will not lie to compel the mayor of a city to perform his official duty generally when the duty involved is the exercise of the police power. In the exercise of the police power city officials are not acting on behalf of the city in its private corporate capacity.
8. SAME—COMPELLING PERFORMANCE IN A PARTICULAR CASE. Nor will the writ of *mandamus* lie to compel the performance of the mayor's duty in a particular case.
9. SAME—GENERAL PUBLIC DUTY—NOT ENFORCEABLE BY MANDAMUS—INTEREST OF RELATORS. Where petitioners claim no special injury to their property rights nor to themselves, but come into court as members of the general public, having the same interest as the general public, and seek to compel the enforcement of a particular law, *mandamus* will be denied. There must be some property interests involved or a specific duty to perform a single particular act, and not a general duty to enforce the law or the exercise of the police power. The remedy for dereliction by an executive official lies with the people themselves.
10. SAME—TO COMPEL MAYOR TO ENFORCE SUNDAY CLOSING LAW. *Mandamus* will not lie to compel a mayor of a city to enforce a state law prohibiting the opening of saloons on Sunday, either generally or as against a certain designated person.

Petition for mandamus. The petition is set out in *haec verba* in *People ex rel. v. Dunne, supra*, in the decision of Judge Chytraus on the motions of respondents to strike out

certain portions of the petition. The respondent Kenna filed a demurrer and the respondent Dunne filed an answer which alleged as follows:

That he admits that certain ordinances of the city of Chicago are in force as set forth in said petition; that he admits the granting of a license for the keeping of a saloon or dram-shop to the co-defendant herein on the date and at the place and for the period, and that said co-defendant has been and still is keeping said saloon or dram-shop at said place, and that said license is still in full force and effect and unrevoked, all as set forth in said petition; that he admits, for the purpose of this answer only, that said co-defendant ever since the issuance of said license (but denies that it has been with the knowledge and consent of this defendant), has kept open said saloon and sold and dispensed intoxicating liquors therein upon Sundays, and intends to continue in the future to keep open his said saloon and to sell and dispense intoxicating liquors therein, upon every Sunday hereafter while said license is in force and effect, but this defendant denies that either this defendant, or said co-defendant, has constantly, openly and notoriously, or in any way whatsoever, violated or disregarded the law of the state of Illinois, referred to in said petition as the Sunday closing law, and denies that said co-defendant has constantly, notoriously or in any way, in violation of said Sunday closing law, kept open said saloon and sold and dispensed intoxicating liquors therein on Sunday.

And this defendant avers that while this defendant has been mayor of said city he has enforced, and during his entire term of office intends to enforce every law that is in force in said city to the best of his ability and power, and to the extent that the forces at his command will enable him so to do.

And this defendant avers that said Sunday closing law is not now and never has been in force or effect in said city of Chicago since its incorporation in 1875 under chapter 24 of the Revised Statutes of Illinois of 1874, known as "An act to provide for the incorporation of Cities and Villages."

And this defendant avers that in and by the said charter of said city, its city council has always expressly had and now has full power to license, regulate and prohibit the selling and giving away of any intoxicating, malt, vinous, mixed or fermented liquor; and that only in so far as *granting* licenses is concerned, has it been or is it requisite or necessary in said city to comply with the law of said state relative to the *granting* of licenses.

And this defendant avers that in and by its said charter, no law in conflict therewith applies to said city; that the provisions of said Sunday closing law are in conflict with said charter, which was granted many years after the enactment of said Sunday closing law.

And this defendant avers that the legislature of said state has not licensed, regulated or prohibited, or attempted to license, regulate or prohibit the selling or giving away of intoxicating, malt, vinous, mixed or fermented liquor in cities and villages organized under said chapter 24 of the Revised Statutes of the state of Illinois of 1874, except in so far as any such legislation may relate to the *granting* of licenses in said cities and villages.

And this defendant avers that at all times since the organization of said city in 1837 (except from June 23, 1852, to February 12, 1853), the legislature of said state has delegated to said city the right to regulate the liquor traffic in said city on all of the days of the week, including Sunday; and said city has ever since its organization in 1837, except as aforesaid, exercised such power to regulate said liquor traffic on all the days of the week, including Sunday; that in the charter granted to said city in 1837, it was provided that its common council shall have the right and power to regulate the selling or giving away of any ardent or intoxicating spirits without any restriction or limitation as to Sunday; that in the next succeeding charter granted to said city in 1851, it was provided that its common council shall have like power without any restriction or limitation as to Sunday, to license, regulate and restrain the selling or giving away of wines and other liquors, whether ardent, vinous or fermented; that

in its next succeeding charter, granted in 1863, the common council of said city was given like power, unrestricted as aforesaid as to all days of the week, including Sunday, to license, regulate and restrain the selling or giving away of wines and other liquors, whether ardent, vinous or fermented, and that this same power remained and continued from 1863 unlimited in said city up to and including its incorporation, as aforesaid, in 1875, since which date continuously said city has had and has exercised such power similarly unrestricted as to all of the days of the week, including Sunday.

And this defendant avers that beginning in 1837, and up to and including the present time (except from June 23, 1852, to February 12, 1853), the city or common council of said city has, pursuant to and under its charter, continuously asserted and exercised, and is now asserting and exercising the authority and power to regulate the selling or giving away of intoxicating liquors in said city on all of the days of the week, including Sunday.

And this defendant avers that said city from a time long anterior to its incorporation in 1875, and continuously since, has under ordinances duly enacted by its city council always authorized and permitted the sale of spirituous, vinous and fermented liquors within said city on all Sundays, *provided only*, that the one engaging in such sale of spirituous, vinous and fermented liquors on Sunday was and is required by said ordinances to keep closed on Sunday all doors opening out upon any street from such bar or room where such liquors are sold, and all windows opening upon any street from the bar or room where such liquors are sold on Sunday must be provided with blinds, shutters or curtains so as to obstruct the view from such streets into such room.

And this defendant avers that from a time long anterior to 1875, and continuously since, under ordinances duly enacted by its city council, the mayor of said city has always granted, and this defendant still does grant licenses for the sale of spirituous, vinous and fermented liquors; that such licenses duly permit such sale on all of the days of the week, including Sunday, at the place designated in such license, provided

always that the person receiving such license shall and will keep closed all doors opening out upon any street from the bar or room where such liquors are sold on Sunday, and that on Sunday all windows opening upon any street from such bar or room where such liquors are sold are provided with blinds, shutters or curtains so as to obstruct the view from such streets into such room.

And this defendant avers that the co-defendant has complied with all of the laws and ordinances governing saloons or dram shops in said city on Sunday, and that the license referred to in said petition and which was granted to said co-defendant was granted to him pursuant to and in compliance with the laws and ordinances in force in said city at the time of the said grant, and that ever since the issuance of said license to him, said co-defendant has complied with all its terms, governing or regulating saloons or dramshops on Sunday.

And this defendant avers that at the time said license was granted to said co-defendant, there was in force and effect in said city, and there still is in force and effect therein, an ordinance duly enacted, which permits the sale of intoxicating liquors on Sundays, but provides that the keeper of the saloon or dramshop shall keep closed on Sunday all doors opening out upon any street from the bar room or room or rooms where such saloon or dramshop is kept, and that all windows opening out upon any street from such bar room, or room or rooms shall on Sunday, except between the hours of 1 o'clock a. m. and 5 o'clock a. m., be provided with blinds, shutters or curtains, placed and maintained in such a manner as to obstruct the view from such street into such bar room, or room or rooms; that said co-defendant has complied with the said ordinance and has not violated any of the provisions or conditions thereof, or of any law having reference to the keeping of a saloon or dramshop within said city on Sunday and the sale or giving away of intoxicating liquors therein or the conduct and management thereof on Sunday.

And this defendant avers that all of the acts charged in said petition were had and done with the knowledge and per-

mission, and under the full authority of the city council of said city and the ordinances by it enacted, and under and by virtue of the license granted by the duly constituted authorities of said city in pursuance of said ordinances.

And this defendant avers that for many years since the incorporation of said city in 1837, and particularly for more than thirty years continuously last past it has always been and now is the uniform and common understanding and belief of all of the mayors of said city and of its city council, and of its police authorities, and of all of its departments of government, that said Sunday closing law does not apply to and was not and is not in force in said city, and that said city has full and complete authority to regulate the sale and disposition of intoxicating liquors in said city on all of the days of the week, including Sunday; that during all of said time all of the mayors and regularly constituted authorities of said city, including the legislative, executive and law departments thereof, have, by contemporaneous interpretation construed said Sunday closing law as having no force or effect or application to or within said city, and that the regulation of the sale and disposition of and the permission to sell intoxicating liquors on Sunday was and is a matter wholly within the control of the city authorities of said city.

And this defendant avers that at the date of the filing of the petition herein, there were and there now are in full force in said city 7,239 saloon or dramshop licenses, which licenses were duly issued and granted by this defendant under and pursuant to said ordinances; that each and all of said 7,239 licensees, as this defendant has been informed and he therefore avers, have conducted during the period of their said respective licenses and at the time of the filing of said petition, were conducting and now conduct saloons and dramshops in said city on Sundays under and pursuant to their said respective licenses, and during said period prior to and at the time of the filing of said petition herein and continuously since, have been selling and disposing of intoxicating liquors on Sunday in their said respective saloons or dramshops, and intend to and will on all future Sundays during

the period of their said respective licenses, all of which run during the period of the license granted to said co-defendant, sell, or dispose of intoxicating liquors, in their said respective saloons or dramshops.

And this defendant avers that if said Sunday closing law is in force in said city, as alleged in said petition, it is and would be a physical impossibility for this defendant to have personal knowledge of or to personally investigate and ascertain the facts in each case, and judge of the sufficiency thereof; that this defendant is not empowered to revoke the license of any saloon or dramshop for an alleged violation of said Sunday closing law, unless the evidence of such violation, if there be any such violation, is clear and satisfactory to him.

And this defendant avers that there are now pending in the circuit and superior courts of said county, at least forty-five petitions for mandamus instituted on or since December 21, 1906, against this defendant, to compel him to close up and revoke the licenses of at least thirty-one saloons or dramshops and fourteen theaters because of alleged violation of said Sunday closing law, and that very many more similar proceedings are threatened to be instituted against him.

And this defendant avers that the revocation of a saloon or dramshop license in said city, and the determination of whether or not the saloon or dramshop keeper has violated the law, are matters which rest wholly within the official discretion of this defendant.

And this defendant claims and insists that this honorable court should not take or exercise jurisdiction to adjudicate the matters set forth in said petition, and should not grant a writ of mandamus as prayed for therein, and having fully answered the said petition, prays to be hence dismissed with his reasonable costs, etc.

To this answer the relators interposed a demurrer.

Messrs. Church, McMurdy & Sherman and Walter J. Müller,
for relators.

Levy Mayer, James Hamilton Lewis, corporation counsel,
and *Daniel P. Murphy,* assistant corporation counsel, for
respondents.

CHYTRAUS, J.:—

Counsel for the petitioner has particularly pressed upon the court the importance, the great importance, of the cause now pending before the court. While, in my judgment, every cause that comes into court is of importance, yet I fully agree with counsel for the petitioner in the importance of this, and the great importance, of this particular cause.

There is considerable earnestness, if not feeling, on the part of the parties to the controversy. On the one hand the parties are engaged in the laudable effort of suppressing vice, and they can see that by and through the means of this court they can attain their object. On the other hand, the parties can see that here is an effort at interference through the means of the court with personal liberty. Questions of this kind invariably arouse feeling.

But the court has no right to participate in the feeling of the parties. The court has but to declare the law, and, when it is declared, enforce it.

I can do no better than to quote here the remarks of Chief Justice Marshall in that great case of *Cohens v. Virginia*, 6 Wheaton, 264, when he was determining a case in which great feeling existed on both sides. He says (p. 404): "It is most true that this court will not take jurisdiction if it should not; but it is equally true that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties a case may be attended, we must decide it if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given. The one or the other would be treason to the constitution. Questions may occur which we would gladly avoid; but we cannot avoid them; all we can do is to exercise our best judgment and conscientiously to perform our duty."

In the case at bar there are two main questions presented, and they are these: First whether the state statute regarding the closing of saloons has any application within the city

of Chicago. The contention by the defense that the Sunday law has no application in Chicago they seek to fortify by the argument of contemporaneous or practical construction. I do not regard them as two separate cases; I regard them as two divisions of one proposition. The other one is, What is the power and the duty of the court when relief of this sort is sought against the executive department of the government? While these questions, as I have already stated, are questions of great importance, I have been aided by the able arguments of eminent counsel on both sides, and to me the answers are so clear that I do not think I need any further time to determine upon the principles of law applicable.

As to the first proposition. The term "suspension of the state law" is used. I do not see that the position of counsel is aided by the use of the term "suspension" rather than the term "repeal." The contention of counsel for the defense amounts to this, that the state law is repealed by the enactment of the charter, the cities and villages act, and the previous special acts applicable to the city of Chicago.

When the question of repeal by implication, as this would be, because there is no express provision for repeal, is urged, there must be a very clear implication, and there must be an inconsistency, in the first place. I agree with the argument of Brother Church on that proposition, and I can see no rule for holding that the city incorporation laws, either the special acts or the cities and villages act, repealed the Sunday closing law. It is my opinion that the Sunday closing law is in full force and effect within the limits of the city of Chicago, as it is elsewhere in the state.

Contemporaneous construction. The term construction here, meaning practical construction, has been urged by the city authorities in permitting, not licensing, the saloons to keep open without any restriction as to the days they might be kept open. I don't think that is a sufficient argument, and I cannot feel convinced by that argument that the law must be regarded as repealed.

We come next to what I regard as the most serious question in the case, and that question involves the construction by the

court of the constitutional principles and the application thereto to the situation before us,—whether as a general proposition the executive of this city shall be compelled by mandamus of this court to perform his official duty when the duty involved is the exercise of the police power. In this connection I want it borne in mind that in the exercise of the police power city officials are not acting on behalf of this city in its private corporate capacity, but purely as executive officers exercising the police power in a geographical division,—a portion of the state; and the term “executive” embraces the mayor and the police department under his contrö. When I use the expression, “as a general proposition,” I use it advisedly and intentionally. Although the petition purports to point out a particular instance or two, yet it is clear upon the record before us that it is designed to compel the exercise of a general duty within the general exercise of the police power.

This is made plainer when we inspect the petition before us. The petitioners come as certain persons who claim no special injury to their property or their property rights, nor, indeed, to themselves, but who come to a court of law as one or two of a general public and as having the same interest, and only the same interest, as the general public. By the petition it is sought to obtain from the court a writ to prevent the mayor, an executive official of a co-ordinate branch of the state government, from committing what, if the petition is true—and in that connection I refer to the intent—is a crime under the laws of the state, namely, the palpable neglect in the performance of his official duties.

There are two classes of cases cited on behalf of the petitioners—at least I divide them into two classes—considered as a sufficient reply to the proposition that an executive officer may be mandamusd by the courts. It will be found that those cases which have been cited divide themselves into cases where property interests have been involved, where there has been a property right involved, or the other class, where the performance of a specific duty to do a single particular act has been involved—that is, not a general duty to enforce the law or the exercise of the police power.

I may here advert to the case of the *State of Mississippi v. Johnson*, 4 Wall. 475. In that case it was sought to compel the president of the United States, by means of a mandatory injunction, to execute the laws of the United States, being a suit on behalf of a state. The bill was filed as an original bill in the supreme court of the United States, but the relief asked for was denied. The opinion of the court, by Chief Justice Chase, refers to those instances of compelling the performance of a ministerial duty that are spoken of in the cases that have been cited. But the court says, referring to that class of cases (p. 499): "The law required the performance of a single specific act; and that performance, it was held, might be required by mandamus."

It appears to me that that is a very clear distinction. At the commencement here it was argued that the proceeding partakes of the nature of an equitable proceeding. No bill in equity lies to prevent the commission of a crime; no bill in equity lies against the city authorities to enforce the performance of duty on behalf of one who has no property rights involved nor any interest involved aside from that which he possessed in common with the general public. These rules of law, applicable in suits in equity, I consider applicable here. Neither courts of law nor courts of equity possess the power to supervise or control executive officials in the administration of the duties of their respective offices where no property rights are involved except in the instance I have referred to and the instance spoken of in the case I last cited. Where there is involved merely the general proposition, Shall the official or shall he not within the scope of his particular office exercise the police power of the state delegated to him under the law of the state? courts must keep their hands off. The remedy for dereliction of duty by an executive official in this respect, if any there be, lies with the people themselves.

Under our form of government executives have, generally speaking, no right and no power to coerce the judiciary in the performance of the duties of that department; neither has the judiciary department the right nor the power to co-

erce the executives in the performance of their duties. Each department in exercising the governmental function assigned to it is co-ordinate and totally independent of the other. That the law has provided for the punishment of judicial malfeasance or misfeasance, but emphasizes this principle. Punishment for such guilt lies with the criminal courts. That such punishment may be inflicted does not extend the jurisdiction of the courts of equity or courts of law.

I suppose the proper order under the view expressed by the court here would be to sustain the demurrer to the petition and overrule the demurrer to the answer.

NOTE.

The above case is now pending in the appellate court under the title of *People ex rel., etc. v. Fred A. Busse, Mayor, et al.*—Ed.

(Circuit Court of Cook County.)

People ex rel. John Reckinger

vs.

Edward F. Dunne, Mayor of the City of Chicago, et al. and
Forty-four Other Similar Cases.

(March 13, 1907.)

MANDAMUS—TO COMPEL MAYOR TO ENFORCE STATE SUNDAY CLOSING LAW AGAINST A PARTICULAR PERSON. *Mandamus* will not lie to compel the mayor of a city to enforce a state law compelling the closing of saloons on Sunday either generally or as against particular individuals. If the court is not empowered to compel the *general* observance of the law, *a fortiori* it cannot entertain a large number of proceedings to compel the enforcement of the law against as many individuals.

Petitions for mandamus, forty-five in number, to compel the closing of thirty-one saloons and fourteen theaters which were alleged to be violating the Sunday closing law. Each petition was directed against a particular saloon or theater. The

cases were heard before Judges Julian W. Mack, Lockwood Honore and George A. Carpenter.

Stedman & Soelke, for relators.

J. Hamilton Lewis, corporation counsel, *Daniel P. Murphy*, assistant corporation counsel, and *Levy Mayer*, for respondents.

HONORE, J.:—

In the matter of the three petitions for mandamus, which were filed, each one of which were assigned to one of the three judges that sat here some time ago, each of the three judges has reached a decision in the particular case assigned to him, and it happens that they coincide so that each one will enter a similar judgment in the particular case before him. Judge Carpenter could not be here today, and asked me to say substantially what his views were in the matter; and I am sorry that counsel for the relators signified that they could not be here, either, but I think it is the judgment of the three—that is—that the decision of the supreme court in the case of *People v. Dunne*, 219 Ill. 346, is conclusive of this case. In that case the supreme court declined to entertain a petition for mandamus to compel the mayor of the city of Chicago to enforce the Sunday closing law and based their decision upon the ground that it was not the intention of the courts to undertake the supervision of the executive departments of the government in their enforcement of the law generally, and if the courts would not undertake to compel the mayor by a writ to enforce a certain law generally, it seemed to follow *a fortiori* the court would not entertain five thousand writs to compel him to enforce the law, instead of in general terms, as to the five thousand different saloon-keepers, and for that reason I think the court is prepared to deny the petition for the writ.

(No appeal was prayed from the above decision.)

NOTE.

Mandamus will not lie to compel a public official to enforce a criminal law either generally or in a specific case.

In *People v. Dunne*, 219 Ill. 346, the court held that a writ of

mandamus would not lie against the mayor of a city to compel him to enforce the Sunday closing law generally throughout the city.

In *People ex rel. McCarroll v. Mohr*, 1 Ill. C. C. 100, Judge Tuley of the circuit court held that *mandamus* would not lie to compel the president and board of trustees of a village to compel them to enforce certain laws and ordinances in relation to gambling, it being alleged that gambling was being carried on at a certain race track.

In *People v. Listman*, 82 N. Y. S. 263, 40 Misc. 372 (aff'd. 82 N. Y. S. 784), an application for a writ of *mandamus* commanding the defendant to enforce certain laws prohibiting Sunday employment, and dramatic performances, on Sunday was denied. But see *People ex rel. Gallagher v. Peck* referred to in 82 N. Y. S. 263 (unreported).

In *State ex rel. Clark v. Murphy*, 2 Ohio Cir. Dec. 190; S. C. 5 Ohio C. C. 332, a petition for *mandamus* was filed against the superintendent of police of the city of Columbus to compel him to discharge his duty in enforcing the Sunday law against dramshops. The application was denied. This decision was relied on by Judge Tuley in *People ex rel. McCarroll v. Mohr*, *supra*.

In *State v. Francis*, 95 Mo. 44, S. C. 8 S. W. 1, a petition for a writ of *mandamus* to compel the police commissioners of St. Louis to enforce the state law prohibiting the sale of liquors on Sunday, was denied.

In *State ex rel. v. Brewer*, 39 Wash. 65, 80 Pac. 1001, a petition for *mandamus* was filed against the sheriff of the county and the marshal of the city alleging that it was their duty to make complaint and prosecute all persons violating the laws of Washington against keeping saloons open for the sale of liquors on Sunday. The application was denied.

See also *Mitchell v. Boardman*, 79 Me. 469; *Bóyne v. Ryan*, 100 Cal. 265; *People v. Whipple*, 41 Mich. 548; Merrill on *Mandamus*, sec. 69; High on Extraordinary Legal Remedies, pp. 315-6; *Cady v. Ihnken*, 129 Mich. 466, 89 N. W. 72; *People v. Leonard*, 74 N. Y. 443; 13 Ency. Pl. & Pr. 497.

Contra Cases.

State of Ohio v. Police Board, 19 Week. L. B. 256, sometimes cited as holding a contrary doctrine, was overruled in *State ex rel. Clark v. Murphy*, 2 Ohio Cir. Dec. 190, S. C. 3 Ohio C. C. 332.

In *State v. Cummings*, 17 Neb. 311, 22 N. W. 545, *mandamus* was issued against a city marshal to compel him to report the names of all persons engaged in the liquor traffic.

In *Moore v. State*, 71 Neb. 522, 99 N. W. 249, *mandamus* was issued against the mayor and chief of police of the city of Omaha commanding them to enforce the laws in relation to gambling. The decision is based on certain statutory provisions.

In *State v. Williams* (Ore.), 67 L. R. A. 166, 77 Pac. 968, a petition

for *mandamus* was filed against the mayor, chief of police, municipal judge and members of the executive board to compel the arrest of certain persons for violating the state gambling statute. The relief was denied as against the chief of police and the writ was granted as to him for the reason that under the Oregon statutes the chief of police is made "a prosecuting officer."

In *Goodell v. Woodbury*, 71 N. H. 378, 52 Atl. 855, a *mandamus* proceeding was instituted to compel the chief of police to prosecute certain persons for violating the liquor laws, and the relief was granted. This case is similar to *State v. Williams*, *supra*. See, also, *In re Whitney*, 3 N. Y. Supp. 838.

In *People v. Mathiessen*, 28 Chi. Leg. N. 345 (reported in this volume) it was held that it was not the duty of the mayor to enforce the Sunday closing law—Ed.

(Circuit Court of Peoria County.)

Chicago, R. I. & P. R. R. Co.

VS.

Brockerson, Mayor of City of Peoria, et al.

(1869.)

1. PRACTICE—TEMPORARY INJUNCTION—WHEN GRANTED. Where it appears that great mischief may be done if a temporary injunction be not granted without notice and the rights of neither party will apparently be impaired by its issuance a court will readily grant such a request.
2. STREETS—CONTROL OF—CITY'S RIGHTS IN REGARD THERETO. While under the Illinois laws, a city is vested with the fee of streets within its limits and can adopt all needful rules and regulations for their use she has not the unqualified control thereof, but holds the fee in trust for the public without power to alien or otherwise dispose of their use.
3. STREETS—RIGHTS OF PUBLIC—LAYING OF RAILROAD TRACKS. The city cannot prohibit the use of streets to its inhabitants or the public generally but it is nevertheless no perversion of their legitimate use to allow a railroad company to lay its tracks along them.
4. RAILROADS—RIGHTS IN STREETS—POWER CONFERRED BY CHARTER—AUTHORITY OF CITY COUNCIL. Where a railroad corporation is given by its charter the right to construct a railroad between two cities, such a grant includes the right to enter the two cities.

A city council has authority to give it the right to run along the streets of the city.

5. **ORDINANCE—CONSTRUCTION—POWER CONFERRED IN THIS CASE ON RAILROAD.** An ordinance conferring power on a railroad corporation to locate its railroad through any street of the city in such a manner as to interfere as slightly as practicable with the convenience of the inhabitants of the city, and also directing the company to construct safe crossings wherever the railroad runs along the streets, confers no power on the railroad company to construct side tracks, switches, etc., in the streets but merely to build its line along such streets as may enable it to conveniently get into and out of the city, provided it does not materially obstruct the streets in so doing.
6. **ORDINANCE—WHEN VOID—CITY COUNCIL EXCEEDING POWER—RAILROAD IN STREETS.** An ordinance conferring on a railroad company the power to run in any of the streets of city, where-ever it sees fit to do so provided it does not materially obstruct the streets is beyond the power of the city council, as such a disposition of the streets would prevent their general use by the public.
7. **RAILROADS—NATURE OF RIGHT IN STREETS—POWER TO LAY SIDE TRACKS.** The right given a railroad to build its line carries with it the power to build side tracks but not in the streets of a municipality; its right of way in a street is a mere easement and if it wishes to lay side tracks it should obtain land by condemnation as pointed out in the statute.
8. **PLEADING—PLEADER MUST STATE FACTS.** In pleading, it is a well known rule that the pleader must state facts, not conclusions.

Bill for injunction. Heard before Judge Puterbaugh. The facts are stated in the opinion.

Ingersoll & McCune, for complainant.

H. W. Wells, for defendant.

PUTERBAUGH, J.:—

The complainant filed its bill for an injunction, alleging in substance that it is the lessee of the Peoria and Bureau Valley Railroad Company, and as such, succeeded to all its rights and privileges granted by its charter; that on the 28th day of July, 1853, the council of the city of Peoria passed an ordinance authorizing and empowering the Bureau Valley Railroad Company to locate, grade, finish and construct its railroad through and along any street, lanes, avenues and

alleys of said city, in such manner as might be necessary for the transportation of freight and passengers, and the loading and unloading of merchandise at necessary points, and to extend the same whenever necessary for its business, etc.; that under said ordinance, the Peoria and Bureau Valley Railroad Company, and the complainant as its lessee, have from time to time constructed, located and erected upon Water street in said city, such tracks, side tracks and switches as they found necessary for carrying on their business, etc. The bill further avers that the immense increase of business, in loading and unloading and carrying merchandise upon the complainant's road has made it necessary to locate and construct upon Water street an additional side track, extending from the junction of North Fayette and Water streets to its shops and freight-house; and that the complainant, as it had a lawful right to do, had recently constructed a side track between the points mentioned, and on the north side of Water street, but that said track is in an unfinished condition; that when finished it will be so constructed as to offer no material obstruction to the passage of teams driven with reasonable care along and upon said street. The bill alleges in general terms that in laying down said side track, it has conformed strictly to the provisions of said ordinance, and has in no manner acted illegally or encroached upon the rights of the city.

The bill then charges that the defendants, claiming to be lawful members of the common council of the city of Peoria, held a meeting on the evening of the 29th of November, 1869, and then and there conspiring, confederating, etc., to injure and annoy the complainant, and to unlawfully destroy and injure its property, and for the further purpose of wrongfully destroying and breaking up the lawful business of the complainant carried on in said city, agreed that they would, by force, tear up and throw out of the street the said side track, by the complainant lawfully constructed and maintained; that the defendants were collecting a crowd of men to commit such unlawful act on the night of November 30th inst.; that the complainant had not sufficient force to resist the defendants and their force. The bill prays for an in-

junction to restrain the defendants from tearing up said side track, as threatened by them.

The bill is verified by affidavit, and alleges that there would be danger of the objects of the injunction being defeated, if notice was given to the defendant.

Under our practice, as applicable to this circuit, where the party enjoined is at liberty on short notice, and for cause shown, to procure a dissolution of an injunction, and is fully indemnified by the complainant's bond, for all damages and expenses incurred by wrongful suing out of the writ, temporary injunctions are granted with considerable facility. The object of a preliminary injunction is to prevent some threatening injury until an opportunity for a full and deliberate investigation is given. The court, upon an application being made, will examine the bill to ascertain whether any serious mischief is likely to occur, and will act upon each case as justice may seem to require. It cannot be expected that a judge can at once in every case determine upon the facts and the law of the case as presented, and besides, the parties have a right to be heard upon the merits of their application. If an injunction without notice is granted, when the circumstances of the case do not satisfy it, the party in whose favor it is granted, is compelled to suffer the consequences upon a dissolution.

In this case the bill was filed on the evening of the 30th of November, and it charged that the defendants were about to do the act complained of the same night, consequently very little time was had for an examination of the bill, and the questions involved being of great public importance, and it appearing that no serious injury could occur to either party by a short delay, it was highly proper that the condition of the parties should not be disturbed until their rights could be fully heard in open court, a temporary injunction was allowed, subject to be dissolved on one day's notice.

The defendants have appeared by their counsel, and demurred to the bill, and moved a dissolution of the injunction.

By the demurrer the defendants admit that all the facts alleged in the bill, and well pleaded, are true.

The only question material to be determined is, whether the facts stated in the bill and exhibits, entitles the complainant to the relief asked, and to a continuance of the injunction.

By the common law, the proprietors of real estate, who lay out the same into towns and cities, retain the fee in the land over which the streets and alleys pass, the public only having the right to an easement. But by our statute the fee simple title to the land embraced by streets, vests in the municipal corporation, to be held in trust for the uses and purposes of the public. The corporate authorities may vacate, alter or change the streets, or may also establish others, but they have not the unqualified control and disposition of them. The city may improve and to a great extent control the streets and public ground, and adopt all needful rules and regulations for their management and use, but she cannot *alien or otherwise dispose* of their use. At most she is but a trustee for the entire public, and like all other trusts, it must be exercised with prudence and discretion.

The municipal authorities of this city cannot divest themselves of, nor abridge their legitimate discretion and duty, to alter and regulate the streets as they in the exercise of sound judgment may deem the public good to require. Nor can they prohibit such use of the streets by its inhabitants and the public generally, as is granted by law to every citizen as a matter of strict right.

While the corporation has thus no right to sell or otherwise dispose of the public streets and alleys, it is no perversion of their legitimate use to allow a railway company to lay down its track upon them, provided it be not a franchise or monopoly only, and be equally open to all citizens.

The Peoria and Bureau Valley Railroad Company was authorized by its charter to construct a railway from Peoria to Bureau Valley, and this authority gave it the right to enter the city of Peoria. It was not the intention to compel it to stop as soon as it touched the city limits, and thus render the road comparatively useless both to the public and the company. The language of the charter requires no such limited construction, and the objects of the law would evidently

be frustrated by so illiberal an interpretation. The city council had the power to authorize the company to lay down its road on Water street, and to run its cars and locomotives over it. The city having the right to grant this privilege to the company, the question arises, what authority and privilege did this ordinance confer.

The first section of the ordinance provides, "That the Peoria and Bureau Valley Railroad Company be, and they are hereby fully authorized and empowered to locate, grade, erect, construct and finish their said railroad through and along any street, lane, avenue or alley, in the said city of Peoria, the said Peoria and Bureau Valley Railroad Company so locating, grading and constructing the same through any and all of the said streets, lanes, avenues and alleys, to locate, grade and construct the same in such manner as to afford as little inconvenience as is practicable to the inhabitants of the said city."

The second section provides that the company in crossing streets, etc., "shall prepare and construct a safe, commodious and convenient passage across the said *railroad track* by said company so located, graded or constructed," etc.

The ordinance nowhere confers the right to lay side-tracks, switches, etc., as alleged in the bill.

It is claimed that this ordinance by implication confers upon the company the right to construct its road along and upon all the streets, avenues, lanes and alleys of the city, whenever it sees proper to do so, provided it does not materially obstruct the streets.

The ordinance in question will bear no such unreasonable and unjust construction. The evident intention and purport of the ordinance is, that the company should have the right to run its cars over any street in the city to enable it to reach its depot or place of business. That is to say, it should have the privilege of using the street in common with the balance of mankind, and to that end was authorized to construct its road in the street to enable it to conveniently enter and depart from the city. If the ordinance meant that the company should so use the street, or any part thereof, so as to

exclude or prevent the balance of the public from its common use, the city council in passing it, exceeded its powers, and the ordinance is void, because, as we have seen, the council have no power to dispose of the public streets so as to prevent their general use by the public.

The grant of this right of way, in my opinion, only conveyed the right to the company to erect their road on the street; it does not include the right to erect a depot, car house, side tracks, switches and other structures for the convenience or business of the road. If it has power to lay down side tracks, it derives its authority from some other ordinance than the one in question.

Railroads are permitted to use the public highways and streets in entering and departing from a city, upon the ground of public necessity and convenience. It would be impossible to construct a road, if it had not this right. But our highways should not be perverted from their legitimate use any farther than is rendered necessary by the necessities of the case.

The counsel for the complainant contends that the right to construct a railroad carries with it the power to construct switches or side tracks. This will no doubt be conceded. But having this right, it does not give the company the power to take the public highways for any such purpose. The right, to construct a railroad, also carries with it the right to build car shops, machine shops, turn-tables, etc. Indeed, it would be impossible for a railroad to get along without them, and yet will the counsel pretend that because a railroad must have these conveniences, that it can, by permission of the city, appropriate the public streets for that purpose? Any ground needed by a railroad for the convenience of its business may be purchased, and if it is unable to obtain it in that way it may proceed to condemn private property in the manner pointed out by the statute.

If a railroad condemns land under the statute for its right of way, it becomes the owner of such land in fee. Not so with a right of way on the highway and public streets. In the latter case it only requires the right to pass over the streets

in common with others. It does not own the ground over which its track is laid, and has no interest in it except the privilege of passing over it. It has no exclusive right to anything except the use of the rails over which it runs its cars.

It is a well known rule of pleading, that the pleader must state facts and not conclusions of law. The complainant has stated no facts in its bill giving it the right to lay down the side track in question, except the ordinance referred to, and in my opinion, that ordinance confers no such authority. And the company having no right to lay down a railroad track upon the public streets, except when authorized so to do by the law, it became and was the duty of the municipal authorities to remove or cause the same to be removed. For these reasons the injunction must be dissolved.

I have not had time to give the authorities a close investigation, or to revise this hastily written opinion, and may have erred in some of the reasons given, but in the conclusions arrived at, I am confident of being correct.

(Criminal Court of Cook County.)

People, ex rel. Hattie Brown,

vs.

The Sheriff.

(Dec. 6, 1877.)

1. **STATUTES—CONSTRUCTION—DEBOGATORY OF COMMON LAW.** Statutes in derogation of the common law must be strictly construed.
2. **VAGRANCY STATUTE OF 1877—INVALIDITY OF—TRIAL BY JURY.** A conviction under the vagrancy act of 1877 which authorizes a justice of the peace to try the accused and sentence him to imprisonment, without the intervention of a jury, cannot be sustained. The constitutional provision which provides that "the right of trial by jury, as heretofore enjoyed, shall remain inviolate," prohibits any deprivation of the right to trial by jury in any case where such right was enjoyed previous to the adoption of the present Constitution.

Petition for habeas corpus. Heard before Judge McAllister. The facts are stated in the opinion.

MCALLISTER, J.:—

Section 2 of the vagrancy act of 1877 (Session Laws 1877, p. 88) under which relator was tried by the police magistrate without a jury, and sentenced to six months' imprisonment, imperatively requires the justice of the peace or police magistrate before whom complaint is made against any person for vagrancy, to proceed within thirty-six hours, and try the accused; and if such justice shall find him guilty, he is authorized to sentence him to six months' imprisonment in the jail, calaboose or house of correction, or at hard labor upon the public streets or highways. It then requires such justice of the peace, in all cases, to make a full record of the case, giving date of complaint, name of defendant, if known, character of charge, names of witnesses examined, "and his findings." It requires the mittimus to state the same, and "the finding of the court, and the sentence."

This is a particular, special and summary proceeding, in derogation of the common law, and the rule is universal that the statute must be not only strictly construed, but all its requirements must be strictly observed. *Bullock v. Geomble*, 45 Ill. 218; 1 Kent's Com. (Comstock's Ed.) 598, note A. and cases cited.

It follows necessarily and logically, from that rule, as applied to the statute in question, that if the statute cannot be executed precisely according to the terms of its provisions, it cannot be at all. By the terms of its provisions, it not only authorizes the justice of the peace to try the accused, without a jury, but it is indispensable to a record made in compliance with the act that it show the finding of the justice upon the question of the guilt of the accused. It is also indispensable to a mittimus issued in the case, that it truthfully recite the finding of the justice, and the sentence. So that the idea of a jury trial is wholly excluded. The justice can issue no warrant of commitment except upon his own finding of the facts in issue upon the complaint.

The act, therefore, unquestionably denies the accused the right of jury trial in cases where the justice is authorized to inflict the punishment of six months' imprisonment in jail, calaboose, house of correction, or at hard labor in the public streets or highways. Is a conviction under it of any validity when tested by the fundamental principles of our state government?

To develop the true state of the question, a brief retrospect of the law as it existed prior to and at the time of the adoption of the constitution of 1870 will be necessary.

By section 9, article 13, of the constitution of 1848, the guarantee of the right of jury trial in criminal cases (except as it had existed at the time that instrument was adopted) was limited to prosecutions by indictment or information, which could be only in circuit courts, or other courts of record having concurrent jurisdiction. But the last clause of section 10 of the same article prohibited all jurisdiction of justices of the peace to try any person for any offense punishable with imprisonment or fine exceeding \$100. The effect of this last clause was to require every criminal prosecution for an offense punishable with imprisonment to be heard in the circuit court, or some court of record having concurrent jurisdiction therewith. Said section 10 is as follows: "No person shall be held to answer for a criminal offense unless on the presentment or indictment of a grand jury, except in cases of impeachment, or cases cognizable by justices of the peace. * * * Provided, that justices of the peace shall try no person, except as a court of inquiry, for any offense punishable with imprisonment or death, or fine above \$100."

So that as is apparent from these provisions, the right to jury trial was, by the constitution of 1848, guaranteed in all cases of criminal prosecutions for any offense punishable by imprisonment. But that is not all. From the adoption of the revised statutes of 1845 down to a time subsequent to the adoption of the constitution of 1870, there was a statute in force defining the offense of vagrancy, making the person accused of it liable to indictment or to be complained against before two justices of the peace, to be there tried upon such

charge; but imperatively requiring that the fact of vagrancy should be established by a jury. "Which shall in all such cases be sworn to inquire the truth thereof, whether the person be a vagrant or not." R. S. 1845, p. 175.. 1 Gross Stat. Ed. 1869, p. 144, sec. 138.

This retrospect shows the state of the laws, both constitutional and statutory, in regard to the right of jury trial, and as practiced upon before and at the time of the adoption of the present constitution. First, it extended to every case of criminal prosecution for any offense punished by imprisonment. Secondly, it was especially required in trials in justices' courts, upon the charge of vagrancy. How is it by the present one? Section 9, art. 2, carefully omits the limitation to prosecutions upon information and indictment, contained in section 9 of article 13, of that of 1848; and extends the guarantee to every criminal prosecution, whether upon indictment and information or complaint before a justice of the peace. "In all criminal prosecutions the accused shall have the right to a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed."

Nor is that the only guarantee involved as to this right in criminal cases. Section 6, article 13, of the constitution of 1848 declared, "that the right of trial by jury shall remain inviolate." In *Ross v. Irving*, 14 Ill. 171, our supreme court, Mr. Justice Trumbull, giving the opinion of the court, gave an interpretation to that clause, and held that this guarantee was to be construed as preserving the right to jury trial, as it was understood to exist at the time of the adoption of the constitution. That decision was in accordance with the almost universal rule of interpretation recognized in this country, and involves these fundamental principles: (1) That the constitution speaks from the time of its adoption. (2) That the clause in question is not regarded as creating the right, but as being a guarantee of preservation of it as it existed at the time. (3) That the extent or limitation of the guarantee is to be ascertained by an investigation into the state of previous and existing laws, or usages, in respect to

jury trials, and as practiced at the time the constitution begins to speak.

We have seen with perfect definiteness, and without the possibility of doubt, that, at the time of the adoption of the present constitution, the right of trial by jury extended to all criminal prosecutions, for offenses punishable with imprisonment and as to the specific offense of vagrancy that existed as an indispensable prerequisite to a conviction. But, notwithstanding the decision in the case of *Ross v. Irving, supra*, the framers of the present constitution, out of superabundance of caution, and to remove the possibility of a doubt, changed the language employed in both of the former constitutions in this state as to the guarantee of this right, and expressed it thus: "The right of trial by jury, as heretofore enjoyed, shall remain inviolate."

To take these words in their natural sense involves no absurdity or conflict with any other provision of the instrument. That being so, it is the duty of the courts to take and enforce them in that sense, and no other. This is the settled doctrine of the supreme court of this state. "That which the words declare is the meaning; and neither courts nor legislatures have a right to add to or take away from that meaning."

The framers of the constitution and the people who adopted it, must be understood to have employed words in their natural sense, and to have understood what they meant. *Hills v. Chicago*, 60 Ill. 86; *Edwards v. City of Springfield*, 10 Chicago Leg. N. 52.¹

No other construction but that of words in their natural sense, in the absence of conflict with other provisions, ought to receive the least countenance from courts. If the meaning which the words in their natural sense convey can be perverted and circumvented by the subtleties of artificial and far-fetched rules, then constitutions are a sham and a snare. Some may say that because the convicted party has the right to appeal on giving bond, the right is substantially preserved. It is not so. The right is preserved as it was theretofore enjoyed; that is, not only in the same cases, but in the same

¹ *City of Springfield v. Edwards*, 84 Ill. 626.—Ed.

manner. As the law existed at the time the constitution began to speak, a jury trial was indispensable to a conviction upon the charge of vagrancy, whether the proceeding was by indictment in the circuit court or on complaint before justices of the peace. That was the right of trial by jury as heretofore enjoyed, and which is guaranteed as inviolate.

In the case of *Greene v. Briggs*, Curtis, C. R. 311,² arising under the constitution of Rhode Island, and where no such clause as we are considering was contained, Mr. Justice Curtis, of the supreme court of the United States, and one of the ablest jurists that ever adorned that bench, said: "The legislature may confer on justices of the peace power to punish offenses; but it must be so done as to preserve, unimpaired, the right of trial by jury; otherwise the whole proceeding is void, *ab initio*." The constitution declares, that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury." But the learned judge further held in that case that the legislature cannot make the right of trial by jury in a criminal case dependent upon the accused giving a bond, with security for the payment of the penalty and costs.

That proposition is clearer and more obvious here, under the emphatic guarantee that the right of such trial as theretofore enjoyed shall remain inviolate, because, if made subject by statute to the condition of giving bond with surety, which was not a condition before, then it is not as theretofore enjoyed.

Cases may be found where statutes giving justices of the peace jurisdiction to try without jury persons accused of minor offenses, created by such statutes, have been held valid. Such is *Murphy v. The People*, 2 Cow. 815; *People v. Goodwin*, 5 Wend. 251; *Duffey v. The People*, 6 Hill, 75; *Plato v. People*, 3 Parker Cr. 586; *McGear v. Woodruff*, 4 Vroom. (N. J.), 213; and there may be others; but in all of them the decision is and will be found to be, put upon the ground that similar statutes existed, and such trials were authorized and practiced

² Fed. Cas. 5,764.—Ed.

before the adoption of the constitution under which the question arose, as well as the particular language of such constitution. Nor does it make any difference that the vagrancy act of 1877 in question makes additions to the definitions of the offense since the new constitution was adopted. In New York, where the right of trial by jury extends "to all cases in which it has been heretofore used," it has been held that these words are generic and cover statutory additions made since the adoption of the constitution to the classes of cases in which jury trial was in use at the time of such adoption. *Fire Department v. Harrison*, 2 Hilton, 455; *Wynehamer v. The People*, 13 N. Y. 378, 426.

The same principle is applied where statutory additions are made to classes as to which the right did not extend at the time of such adoption. *Duffey v. The People*, 6 Hill, 75. I have given this matter a very careful investigation, and am fully satisfied—indeed I have not the slightest doubt—that the second section of the act in question purports to confer on justices of the peace the power to try for vagrancy without a jury. Its terms can be complied with in no other way; that the right of jury trial, as to charges of vagrancy, not only existed for at least a quarter of a century before and at the time the present constitution was adopted, but such trial was indispensable in the first instance, and to a lawful constitution; that by the guarantee that such right, as it had theretofore been enjoyed, should remain inviolate, it was preserved as it existed and was enjoyed; and that, therefore, any conviction under section 2, of this statute, whereby that right is denied, is void *ab initio*.

From these views it follows that the imprisonment of the relator is illegal, and she is entitled to be discharged.

NOTE. See the contra opinion of Judge McCulloch in *People ex rel. v. Hitchcock* and the later opinion of Judge McAllister in *People ex rel. v. Superintendent*, immediately following this opinion.—Ed.

(Circuit Court of Peoria County.)

The People ex rel. Cain

vs.

Frank Hitchcock.

(1878.)

1. **CRIMINAL CODE—CONSTRUED AS AN ENTIRETY.** The criminal code must be construed as an entire enactment. Amendments thereto must be read as if they constituted a part of the original enactment.
2. **VAGRANCY ACT OF 1877—CONSTITUTIONALITY OF—RIGHT OF TRIAL BY JURY UNDER.** The vagrancy act of 1877 is not unconstitutional as depriving a defendant of the right of trial by jury. The sections in relation to vagrancy being a part of the criminal code must be construed in connection with the other portions of such code and inasmuch as a jury trial is provided for in other parts of such code a defendant charged with vagrancy is entitled to a jury trial.

Petition for habeas corpus. Heard before Judge McCulloch. The facts are stated in the opinion.

McCULLOCH, J.:—

The petitioner was convicted before a police magistrate of the city of Peoria on a charge of vagrancy, and sentenced to the county jail for a period of sixty days. He now petitions to be discharged from imprisonment on the ground that the statute under which he was convicted is unconstitutional, in that it denies him a trial by jury. The record of his conviction does not show, nor is it contended, that he even demanded a jury, nor that a jury was in fact denied him. He rests his case wholly upon the unconstitutionality of the act of the legislature of 1877, defining and punishing the offense of vagrancy. Had he demanded a jury trial, and had the same been denied him, a different question might have arisen. It is now contended that, by the terms of the statute, he is denied that right, and, therefore, it would have availed him nothing to have demanded a jury. The statute in question is entitled "An act to amend an act entitled an act to revise

the law in relation to criminal jurisprudence, approved March 27, 1874." The act so entitled is chapter 38 of the revised statutes of 1874, better known as the Criminal Code. The act of 1877 provides in its first section that sections 270 and 271 of the act of 1874, "be and the same are hereby amended to read as follows," etc. The two sections so amended relate to the subject of vagrancy, and the amendments are germane thereto. Section 270 provided that vagabonds, idle and dissolute persons, who go about begging, and others mentioned, might be confined in the county jail, or in the workhouse, or in the house of correction, not exceeding six months. Sec. 271 provided that when a person should be convicted before a justice of the peace, or police magistrate, of any offense mentioned in the preceding section, he might, instead of the punishment therein mentioned, be fined not exceeding \$20, with or without condition that if the same, with the costs of the proceeding, was not paid within the time specified, he should be committed to the county jail, or to the workhouse or to the house of correction, as provided in the preceding section, which conditional sentence should be carried into execution, as in other cases of commitment. Neither one of these sections provided for a trial by jury. But we are at liberty to look to other portions of the same chapter for such provision. Sec. 1, div. IX, of the Criminal code (numbered 381 in the revision of 1874), gives justices of the peace jurisdiction in cases arising under said sections 270 and 271. Sec. 4, div. IX, provides that the person accused may have the cause tried by a jury upon the same conditions (except as to payment of jury fee), and the jury shall be summoned and impanelled in the same manner as in civil cases, before justices of the peace. Sec. 44, ch. 79, R. S. 1874, provides that in all cases of trial before a justice of the peace, either party may have the cause tried by a jury if he shall so demand before the trial is entered upon. The number of jurors shall be six, or a greater number, not exceeding twelve as either party may desire. Sec. 5, div. IX, Criminal Code, provides that if the jury find the accused guilty, they shall assess the fine, or fix the punishment as aforesaid. Sec. 6 provides

that upon the jury returning their verdict the justice shall record the same in his docket, or record book, and proceed to render judgment thereon accordingly, with costs. Sec. 7 provides that upon the rendition of judgment, imposing a fine, the justice shall, except as otherwise provided, issue execution against the goods and chattels of the defendant for the fine and costs, which may be levied upon any personal property of the defendant not exempt from execution. Sec. 8 provides that if the execution is returned unsatisfied the justice shall issue a *capias* against the body of the defendant, who shall be committed to the county jail for forty-eight hours, and for twenty-four hours, additional for every \$5 fine over and above \$10. The provisions of these last two sections are so modified by the foregoing sections in relation to vagrants, that the justice may make it a part of his judgment that if the fine be not paid within a time specified, the defendant shall be committed to the county jail, work house or house of correction for a period not exceeding six months.

These references to the statute show very clearly that under sections 270 and 271, R. S. 1874, a party charged with vagrancy was not denied the right of trial by jury. If, now, we put in the place of these two sections, the amended sections of 1877; and read the whole chapter as one statute, as we are bound to do, there would seem to be no good reason for saying that a party charged with vagrancy is thereby denied the right of trial by jury, unless by the terms of the amendment that right is expressly taken away, or unless such trial would be incompatible with its provisions. The right of trial by jury is one which the legislature cannot take away. It will not be presumed that it intended to do so unless that intention is made clearly to appear. When a statute is amended, the change must be found in the words of the amendment, or it must follow as a necessary implication therefrom. It is provided in the constitution that no law shall be revised, or amended, by reference to its title only but "the law revised, or the section amended shall be inserted at length in the new act." The statute is then read as if the amended sections constituted a part of the original act, and the whole

must be construed together, in order to arrive at the true meaning of the amendment. Applying these principles to the statute in question, we find in the context certain provisions relating to jury trials in all cases within the jurisdiction of justices of the peace and police magistrates, which a person charged with vagrancy may invoke, unless there be something in the amendments themselves which in terms or by necessary implication deny the right of trial by jury.

It is said, however, that because the amended sections provide only for a trial by the justice or police magistrate, that there is no place in the statute for a jury trial. Were we to confine ourselves strictly to the amended sections, this might be true. But the same course of reasoning would destroy the efficiency of many of the provisions of the criminal code. The several provisions defining crimes and fixing the punishment, do not in terms provide for trials by jury. There is no law providing specifically that any one charged with murder, arson, burglary, larceny, robbery, and the like, shall be tried by jury. It is only when we come to section 8, div. XIII, that we find it provided "that all trials for criminal offenses shall be conducted according to the course of common law, except when this act points out a different mode." Now the legislature of 1877, amended sec. 36, relating to burglary, sec. 168, relating to larceny, sec. 186, relating to malicious mischief, and sec. 213, relating to taking illegal fees. It would be just as logical to say that each one of these acts is unconstitutional, because it does not provide for trial by jury, as to pronounce the law in question void for that reason.

Sec. 271, as it now reads, provides that the justice of the peace, or police magistrate shall, within thirty-six hours after complaint made before him, proceed to try the person accused of being a vagabond; and if he pleads guilty, or if he be found guilty, the said justice of the peace or police justice may sentence the said vagabond to imprisonment at hard labor upon the streets or highways, or in the jail, calaboose or other building used for penal purposes of the county, town, village, city or other municipality in which such vagabond

was convicted, or the house of correction of any city having a contract with such county for the care of prisoners, for a term of not less than ten days, and not exceeding six months, in the discretion of the said justice of the peace, or police justice; or the said justice of the peace or police justice may sentence the said vagabond to pay a fine of not less than twenty dollars, nor more than one hundred dollars, and costs of suit, and in default of immediate payment of said fine and costs so imposed, said vagabond shall thereupon be sentenced to imprisonment at hard labor in said jail, calaboose, or other building used for penal purposes, or in said house of correction or on the public streets or highways, for a term not less than five days, nor more than six months by said justice of the peace, or police magistrate.

The language so employed, if it stood alone, might be construed to mean that the trial and the fixing of the penalty were exclusively the work of the magistrate. But by the same chapter as now amended (div. IX, sec. 4), it is provided that the person accused may have the cause tried by jury; and by the same statute (div. IX, sec. 5), it is provided that if the jury find the accused guilty they shall assess the fine, or fix the punishment. By section 6, the justice is required to record the verdict as part of the proceedings, in the case, and then to render judgment thereon. I am unable to see why these provisions do not apply as well to the sections relative to vagrants as to any other cases within the jurisdiction of the justice of the peace. He is required under the vagrant act to take a complaint, setting forth the name of the offender, if known, the place and date of the offense, and such other facts as will if substantiated by competent witnesses, establish the guilt of the prisoner. He is also to make a full record of the case, giving the date of complaint and of the offense, name of defendant, if known, and character of the charge, the names of all witnesses examined, and his findings, together with all other proceedings in the case; and when the accused is committed the mittimus must show the date of the charge, name of the complainant, name of defendant, if known, the offense charged, names of all witnesses examined,

date and place of trial, the finding of the court, and the sentence imposed. It will thus be seen that the proceedings for his conviction are quite as full, if not as formal, as if the defendant had been proceeded against in a court of record. The record so made would be as complete a bar to any future prosecution for the same offense as if the judgment had been rendered in any other court.

Reference was made in the argument to a decision rendered in the criminal court of Cook county, by a very distinguished jurist, in which a different conclusion was reached. *The People ex rel., Hattie Brown*, Leg. N. Dec. 1877.¹ I have carefully considered the opinion rendered in that case, and am constrained to say, that it seems to overlook the fact that the act of 1877 is an amendment to the criminal code, and must be read in connection therewith. It seems to treat that act as an independent statute, having no connection with that of which it professes to be an amendment. I am compelled for the reasons hereinbefore indicated to come to a different conclusion, and to hold that the right of trial by jury is not denied to a person charged with vagrancy under the act of 1877.

It must be confessed the act is highly penal and ought to receive a strict construction. But I know of no reason why jurisdiction in this class of cases may not be conferred upon justices of the peace and police magistrates.

The constitution of 1848 (art. XIII, sec. 10), limited the jurisdiction of justices of the peace in criminal cases to those in which the punishment was by fine only, and that not exceeding \$100. I find no such limitation in the constitution of 1870. Art. VI, sec. 21, provides that justices of the peace, police magistrates and constables shall be elected in and for such districts as are or may be provided by law, and the jurisdiction of such justices of the peace and police magistrates shall be uniform.

Art. II, sec. 8, provides that no person shall be held to an-

¹ Reported in this volume immediately preceding this opinion. See also the later opinion of Judge McAllister on the same subject, immediately following this opinion.—Ed.

swer for a criminal offense, unless on indictment of a grand jury, except in cases in which the punishment is by fine or imprisonment otherwise than in the penitentiary, in cases of impeachment, and in cases arising in the army and navy, or in the militia, when in active service, in time of war or public danger.

I find no other limitation upon the power of the legislature to confer upon justices jurisdiction in criminal cases. The statute in question confers jurisdiction in this class of cases upon justices of the peace and police magistrates, and authorizes them, upon conviction, to sentence the offender to imprisonment in the county jail for a period not exceeding six months. Inasmuch as ample provision is made for the trial of such cases by a jury when demanded by the accused, I can see nothing unconstitutional in the act. There being no other question raised in the case, I can see nothing illegal in the petitioners imprisonment. He will therefore be remanded to the custody of the sheriff, to be held under the warrant of commitment until the expiration of his sentence.

(Circuit Court of Cook County.)

People ex rel. Scully and O'Leary

VS.

The Superintendent of the Bridewell.

(1878.)

1. **CRIMINAL STATUTES—CONSTRUCTION OF.** Criminal statutes must be strictly construed in favor of an accused.
2. **TRIAL BY JURY—WAIVER OF.**—A trial in a felony case by a jury of less than twelve jurors even with the express consent of the prisoner, would be void. In trials for misdemeanors the rule is otherwise.
3. **TRIAL BY JURY—CONSTITUTION OF 1870—CONSTRUCTION OF AS APPLIED TO NEW OFFENSES.** The provision of the constitution of 1870 to the effect that the right to trial by jury "as heretofore enjoyed" shall remain inviolate, covers every new definition of the same class of crime as to which the right of jury trial was before enjoyed.

4. VAGRANCY ACT—CONSTITUTIONALITY OF—DENIAL OF TRIAL BY JURY. The vagrancy act of 1877 (section 271) is unconstitutional and void inasmuch as it deprives an accused of the right of trial by jury.
4. STATUTORY CONSTRUCTION—STATUTE DIRECTING MANNER OF PROCEDURE. If an affirmative statute which is introductive of a new law, directs a thing to be done in a certain manner that thing cannot be done in any other manner, even though there be no negative words.
5. SAME—MODE OF PROCEDURE RENDERING LAW UNCONSTITUTIONAL—ADOPTION OF NEW MODE. If in a statutory proceeding the legislature has prescribed a mode of making it effectual, which is unconstitutional the courts have no authority to reject that mode and adopt a different one.
6. VAGRANCY ACT—PUNISHMENT UNDER—EFFECT OF UNCONSTITUTIONAL AMENDMENT. Section 271 of the vagrancy act of 1877 being unconstitutional, the original section remains in force. The only punishment that can be imposed therefore is a fine of \$20.

Petition for habeas corpus. Heard before Judge McAllister. The facts are stated in the opinion.

MCALLISTER, J.:—

The questions for decision here arise upon return to habeas corpus. Relators, without trial by jury or waiver thereof, were convicted before Geo. W. Mitchell, Esq., police justice of the town of Lake, for alleged vagrancy, under secs. 270 and 271 of the criminal code as amended by the act of 1877, and sentenced, one to sixty days and the other to ninety days' imprisonment in the city bridewell. In *Ex parte Brown*,¹ while holding the criminal court in December last, I passed upon the same question involved here, and held sec. 271, as amended, to be unconstitutional. But the correctness of that decision having been challenged by brother judges in other circuits,² and a justice of the peace in this county having disregarded it, and the question being before me in these cases, I have re-examined it with greater care and deliberation.

Sec. 270 as it stood in the code of 1874 defined the offense of vagrancy, and prescribed a punishment which was not ex-

¹ Reported in this volume.—Ed.

² See the opinion in *People v. Hitchcock* reported herein.—Ed.

ceeding six months' imprisonment. Then follows sec. 271, which provides that when a person is convicted before a justice or police magistrate of any offense mentioned in the preceding section, instead of being punished as therein mentioned, he may be fined not exceeding \$20. Then came the amendatory act of 1877. The first section declares that secs. 270 and 271 of "an act to revise the law in relation to criminal jurisprudence, approved March 27, 1874, be and the same hereby are so amended as to read as follows:" Then follow two sections, 270 and 271. The former defines the offense by extending the definitions, but leaves off the punishment prescribed in the original 270. Sec. 271, as amended, prescribes the mode of procedure and the punishment, which may extend to six months' imprisonment or hard labor on the highway. No question has ever been made as to the validity of sec. 270 as amended; but, being valid, it takes away the punishment prescribed in the original 270. It is section 271 alone whose validity is questioned. So that, if that section, as it purports to amend original 271, shall be found unconstitutional and void, then it is as nothing; the punishment mentioned in it cannot be inflicted; the original 271 will stand unaffected by the supposed amendment—the result of which will be, that the only punishment which can legitimately be imposed, on conviction for vagrancy, will be the fine of \$20 mentioned in the original 271.

In my view, therefore, the principal question in the inquiry is, whether that section as amended by the act of 1877 is valid, or unconstitutional and void. And in its investigation I propose to act only upon settled principles of law, to be applied according to the best of my ability. The age is ripe with conflicting views about almost everything. But if, in the domain of law, there be not such things as established principles—if there be, in reality, no such thing as right reason—then the sages of the law have woefully deceived at least one of their humbler but devoted disciples; nor does the question turn upon a construction of that section with a general one in the criminal code. This is a criminal statute only, and the rule is universal that such statutes must be construed

strictly. What were the rights of a person accused of vagrancy when the act of 1874 was passed? The result of this inquiry is very material. When the constitution of 1848 was adopted, there was, and for many years before had been, a statute in force in this state, defining vagrancy, and the mode of procedure for its punishment. One mode was by indictment, where a jury, unless expressly waived, would be required. The other was a prosecution upon complaint, and before two justices of the peace, who were authorized to punish, the fact of vagrancy having been first found by a jury "which," the statute said, "shall, in all such cases, be summoned and sworn to inquire the truth thereof, whether the person be a vagrant or not." See: R. S. 1845, sec. 138, p. 175. Now, by that statute, it was not only the right of the accused to have a jury trial, but such trial was absolutely indispensable to a lawful conviction as much as in the case of robbery, burglary, or any other felony, in which cases it has been held by some of the most respectable courts in the land that a trial by any less than twelve jurors, with even the express consent of the prisoner, would be void, because the tribunal would be one unknown to the law, the mere voluntary creation of the parties: Cooley Const. Lim. 319, cases in note. But in misdemeanors it would be competent to so agree.

The constitution of 1848, such statute being in force, contained the guarantee that "the right of trial by jury shall remain inviolate;" the interpretation to which, as given by the supreme court in *Ross v. Irving*, 14 Ill. 171, was that it preserved the right of jury trial as it was understood to exist at the time of the adoption of the constitution. The same statute continued in force down to the adoption of the constitution of 1870, and that contained the same guarantee expressed in broader language, viz: "The right of trial by jury, as heretofore enjoyed, shall remain inviolate." These words are considered by the courts as generic, and cover every new definition of the same class of crime as to which the right of jury trial was before enjoyed. See cases in *Ex parte Brown*, 10 Chicago Leg. N., No. 12, p. 96.¹

¹ Reported in this volume.—Ed.

We are now prepared to consider the precise character of sec. 271 as amended. After providing, with an unintelligible jumble of words, for the arrest of accused, which I could never understand, and that he shall be taken before a justice of the peace, it says: "And the said justice of the peace or police magistrate shall, within thirty-six hours, proceed to try the person accused of being a vagabond, and if he pleads guilty, or if he be found guilty, the said justice of the peace or police magistrate, may sentence the said vagabond to imprisonment," etc. Here no mention is made of a jury; the language is entirely consistent with the justice only passing upon the question of guilt. Still, if this were all, I would say that it might be construed with reference to the other provisions of the criminal code, and a jury might be called. But the other provisions of the section mark out a particular mode of procedure entirely outside of anything in the criminal code, which utterly precludes the practicability of a jury trial, and shows that it was intended there should be none. They are as follows: "In *all* cases under this act the justice shall make a full record of the case, giving the date of the complaint and of the offense, name of the defendant, if known, and character of the charge, the names of all witnesses examined, *and his findings*, together with all other proceedings." What is this the justice is to make? A record of the case; the case as it was; and that record must state "his findings." Not the verdict of a jury, but the finding of the justice in the place of a jury. But it has been said by a brother judge in another circuit that the expression, "his findings," only meant his sentence or judgment, and that might be upon the verdict of a jury.

This argument is entirely refuted by a further provision in the section, which is so explicit as to leave no room for cavil or doubt. After the finding of guilt by the justice, and sentence, of which he is to make a record, then comes a provision for carrying into effect, and that is by a writ called a mittimus, well known to the law, it is true; but here particular requisites are prescribed, differing from any other in the code; "which said mittimus *must* show the date of the charge, name of the defendant, if known, the offense charged, names

of all witnesses examined, date and place of trial, *the finding of the court, and the sentence imposed.*" Now if the "finding of the court," and "the sentence imposed," are one and the same thing, why are they both mentioned in this way by a copulative conjunction? The mittimus must not only state the finding of the court, but the sentence imposed also. One which omitted the finding of the court upon the question of guilt, and only stated the sentence, would be utterly void as not in compliance with the statute, assuming that to be valid. Those words, "the finding of the court," have just as definite and well-understood meaning in this state as the words "verdict of the jury" or "finding of the jury." There is authority for parties, in civil cases, to waive a jury and by agreement try them before the court. In all those cases of trial of issues of fact without a jury, the conclusion of the court upon the evidence given on those issues is called "the finding of the court." That expression is as common in the supreme court reports as that of "the finding of the jury" or "verdict of the jury." For these reasons that section denies the right of trial by jury. The legislature did not intend there should be a jury trial, for there is no mention of it; it is excluded by the language used in the requirements both of the record and mittimus. Surely they did not intend the justice should make up a solemn record of a falsehood—a mittimus that recited a lie. This section is introductive of a new law, and describes a certain manner in which the statute shall be carried into effect; it therefore impliedly prohibits it being done in any other manner. "It is a maxim generally true, that if an affirmative statute which is introductive of a new law directs a thing to be done in a certain manner, that thing shall not, even though there are no negative words, be done in any other manner." Potter's Dwaris on Statutes 72, Sedgwick on Statutory Construction, 31. That rule directly applies here. There can be no substitution of something else in the place of any of those things which the provisions of that section say the record and mittimus must show. Leave out the finding of the court and substitute the verdict of a jury, and the whole proceedings are void, *ab initio*, assuming the statute to

be valid. It is, therefore, the inexorable decree of logic and law that the provisions of that section cannot be carried into effect within their precise requirements without denying the right of trial by jury.

In *Ross v. Irving*, *supra*, the supreme court said: "In our view, the law must be carried into effect in the manner prescribed by the act itself, or not at all. It is a statutory proceeding, and, if the legislature has prescribed a mode of making it effectual which is unconstitutional, the courts have no authority to reject that mode and adopt a different one." This doctrine was approved and applied again in *Union Building Association v. Chicago*, 61 Ill. 439, 446, and is unmistakably applicable to this case.

If that section deprives a defendant of the right of trial by jury, as I feel sure it does, it is clearly unconstitutional and void. It therefore did not amend the original sec. 271 and leaves it as it stood, authorizing a fine of \$20. But original 270 having been amended by leaving out the punishment therein prescribed, there is no punishment left but in original 271. Disregarding sec. 271 as amended, prosecutions upon 270 as amended may be had, by giving the accused a jury trial; but the punishment must be as above stated. This is the way the case works out in my mind, and until I am overruled by some other justice of the peace I hope to have no more trouble with these questions, before they are finally adjudicated by the supreme court.

The relators will be discharged.

NOTE.

See the former opinion of Judge McAllister and the contra opinion of Judge McCulloch in relation to the same subject, both of which opinions are reported in this volume.—Ed.

(*Superior Court of Cook County, In Chancery.*)

Frank H. Collier

vs.

Fannie G. Collier.

(1898.)

1. **DIVORCE—INSANITY.** Insanity is not a cause for divorce in Illinois.
2. **DIVORCE ON GROUND OF CRUELTY AND DESERTION—ACTS OF COMPLAINANT NOT A BAR WHEN COMMITTED UNDER INSANE IMPULSE.** When complainant is entitled to a decree of divorce on the ground of cruelty and desertion, the fact that he has been guilty of misconduct does not debar complainant from obtaining such divorce, where at the time of the misconduct he was acting under an uncontrollable insane impulse.

Bill for divorce and cross-bill. Heard before Judge Henry V. Freeman. The facts are stated in the opinion.

W. P. Black, S. A. Wight and Frank H. Collier, pro se, for complainant.

Donahue & Hartnett, for defendant.

FREEMAN, J.:—

The original bill of complaint in this case, filed by the husband, Frank H. Collier, charges the defendant, Fannie Collier, his wife, with cruelty and desertion. A cross-bill is also filed by the wife. Each party, also, charges the other with adultery.

In the view that I take of this case it will not be necessary to discuss the testimony with reference to this latter charge, as made in the original bill. I intentionally avoid any such consideration, because I believe that the complainant in the original bill is entitled to divorce upon the other grounds; and a just regard for the reputation and feelings of the innocent children of the parties seems to me to require that no unnecessary shadow shall be thrown over their future lives.

With reference to the charges of cruelty and desertion against the wife, it is, I think, only necessary to say that they are abundantly justified by the evidence; and this seemed to

be practically conceded by the counsel for the wife in his closing argument.

The complainant in the bill in consequence, as the testimony tends to show, of a blow upon the head, inflicted about ten years ago, became the victim of what is known as circular insanity. The chief characteristics of the disease appear to have been a period of excitement or mania, followed by a period of melancholia, which in turn has been succeeded by a period of comparative sanity, the longer duration of which of late is said to indicate a growing tendency toward restoration to normal health. The evidence tends to show, and the whole appearance and conduct of Mr. Collier during the hearing indicate, that he is at the present time in the full possession of his mental faculties; and, as several of the medical experts stated, apparently in better health than he ever has been since the original attack of the disease.

The testimony tends to show that soon after the malady manifested itself he was sent to Wauwatosa, a private retreat for persons afflicted with nervous and mental diseases. From there, according to testimony which is uncontradicted, he was brought to Chicago by a false telegram. When within the jurisdiction of the courts of Cook county he was immediately arrested upon a charge of insanity, and committed to an asylum. I shall not undertake to follow up the numerous trials, nor the commitments to and discharges from asylums, which are disclosed by this testimony; but it appears from the evidence that at the time his disease began to manifest itself Mr. Collier was the possessor of considerable property. He was by no means a pauper, and the evidence tends to show that had his estate been properly conserved it might have furnished adequate support for himself and his entire family during the period of his illness. It appears, however, that at the instigation of his wife, and on her complaint, he was twice committed to the Cook county insane asylum at Dunning as a pauper. This treatment was certainly illy calculated to promote his restoration to a sound condition of mental health. The evidence tends to show that he was there subjected to indignities amounting even to cruelty, which

could not but have had an injurious effect upon his malady. Possibly the conduct of his wife toward him at this and subsequent periods is explained by her own statement upon the stand, that even prior to this time she had come to entertain for her husband a feeling of loathing, which she says began prior to or about the time of the birth of one of her children, and has continued ever since.

As I have stated, it was conceded practically, by counsel for the wife, in his closing argument,—and I think the concession is amply justified by the evidence, which I deem it unnecessary to review at length—that the complainant is entitled to a divorce on the grounds I have indicated, unless the evidence should further show that the charges made in the cross-bill are of such a character and so sustained as to forbid granting to the complainant in the original bill any relief whatever.

It must be conceded that the conditions confronting the wife and children of the complainant during a portion of the period when he was under the influence of his malady were of a most trying character. There were times when the complainant, although discharged from confinement by action of the courts, as sane, and left in control of his property and children, was nevertheless indulging in conduct of such a nature that if he had been at the time in full possession of his mental powers it would have been not only inexcusable, but it would have entitled a wife to a decree against him. If these acts had been committed while he was sane they would have gone far to justify some portion of the treatment he received from his wife which I have referred to. But it is contended that at the time when he committed the acts in question the complainant in the original bill was under an uncontrollable insane impulse, and the expert testimony tends to sustain this contention. In other words, the defense is that these acts were not the acts of the complainant himself, but the acts of one who was insane and not responsible for his conduct. If this is true, then it must be held that conduct of which he was guilty at that time, committed under the influence of insane impulses over which he had no control,

does not afford ground for the relief prayed in the cross-bill. Insanity itself is not a cause for divorce in this state. The marriage vow carries with it ordinarily the obligation on the part of both husband and wife to care each for the other, in sickness as well as in health, and mental sickness does not change the obligation. The evidence tends to show that the acts complained of in the cross-bill were committed at the time when the husband was under the influence of the malady, and there is no sufficient evidence to sustain the contention that any of the acts alleged to have been committed by the husband, which would entitle the wife to the relief she seeks by her cross-bill, were committed at the time when the husband was free from the influence of mental disease.

The complainant is entitled to the relief which he seeks, and a decree may be prepared granting him a divorce upon the ground of cruelty and desertion.

(Superior Court of Cook County, In Chancery.)

Thomas M. Meldrum

vs.

Sam. S. Shubert, et al.

(March 12, 1904.)

1. TRADENAME—NECESSITY OF ACTUAL USE TO ESTABLISH RIGHT TO.

To entitle a person to the exclusive use of a tradename two conditions must exist: first, adoption of the name or mark, and second, its actual use. An intent to use at some time in the future is not sufficient.

2. SAME—USE IN CONNECTION WITH ESTABLISHMENT. A tradename must actually be used in connection with the establishment which it is intended to designate.

3. SAME—PROTECTION OF TRADENAME IN EQUITY. The name established for a hotel or theater is a trade name, in which the proprietor has a valuable interest, which a court of equity will protect.

4. SAME—NOT NECESSARY TO SHOW FINANCIAL LOSS TO OBTAIN PROTECTION. It is not necessary in order to obtain protection in respect to a trade name, that the complainant be menaced with

financial loss. It is sufficient if he might be inconvenienced, interfered with or annoyed.

5. SAME—THE NAME "GARRICK THEATER" PROTECTED. The complainants were the owners of a small local theater known as the "Garrick" theater. The defendants announced their intention of applying the same name to their theater, a large theater in the heart of a city, which was formerly known under another name. Held that the complainants were entitled to an injunction.

Bill for an injunction. Heard before Judge Jesse Holdom. *Taylor E. Brown, Thomas J. Graydon, Wm. Friedman* and *C. C. Poole*, for complainant.

Herman Frank, of *Felsenthal & Foreman*, for defendants.

STATEMENT OF FACTS BY THE COURT.

The cause came before the court on October 3, 1903, upon bill filed and motion for injunction *pendente lite*, the injunction having been recommended by master in chancery Browning. The court declined to confirm the recommendation of the master and various hearings were had; additional affidavits filed by each party; a stipulation was entered into to the effect that various affiants whose affidavits had been filed, if called as witnesses, examined and cross-examined, would testify to the statements contained in said affidavits; and that the affidavits should be treated as proofs in the cause. The cause then proceeded to final hearing upon bill, answer, replication and proofs as filed, was argued and submitted Wednesday, October 28th, and subsequently briefs were filed by each party. The following statement of facts was prepared by the court.

FINDINGS OF FACT.

Complainant, in October, 1902, leased a building at Milwaukee avenue and Will street, Chicago, for ten years, and at an expenditure of about ten thousand dollars converted it into a theater and called it "The New Garrick," and as such, on November 15, 1902, opened it to the public. That about

December 1, 1902, it came to be called and known as the "Garrick." Complainant from that time operated his said theater, and called it the "Garrick," until the completion of the theatrical season, May 20, 1903, when it was closed for repairs and alterations, and was about to be re-opened for theatrical performances as the "Garrick" theater at the time of the filing of the bill herein; that during all of the time mentioned, complainant's theater was advertised in the newspapers, on billboards, letterheads and tickets, as the "Garrick" theater, and was so referred to in newspaper theatrical notices and criticisms of its actors and performances, during all of which time it was the only theater in Chicago with the word "Garrick" in its name.

On March 19, 1902, defendants leased what was then known as the Dearborn Theater on Randolph street, near Dearborn, for a term of ten years, commencing September 1, 1903. That they thereupon concluded to adopt the name of "Garrick" for their new theatrical house. That as early as April, 1902, defendants caused to be published in the Chicago newspapers, articles announcing the new lease (although intentionally avoiding naming the lessees); and that after September 1, 1903, the theater would be renamed and called the "Garrick." Knowledge of this fact at this time was not brought home to the complainant, and not until December 1, 1902, did he know of the intention of the defendants to name the Dearborn theater the "Garrick" on its coming into their possession, which fact he first learned by reading a statement to that effect on that day in the New York Clipper, a publication devoted to theatrical news. Complainant soon after reading the notice in the New York Clipper sent a letter to defendants, by mail, to New York, informing them of his being the operator of a theater called the "Garrick," and enclosing posters, programs and advertising matter corroborative of such statement, and again on September 1, 1903, sent defendants similar notice by mail, with like enclosures, directed to them at Chicago.

Complainant's theater is what is generally known as a local and a neighborhood theater, its patrons being for the most

part residents in the vicinity of its location; while the theater of the defendants is a large metropolitan theater in the downtown district and draws for its patronage upon all the residents of Chicago generally and the strangers within her gates.

In most of the posters, programs, tickets, and other literature of defendants is printed, "The Garrick, formerly Dearborn Theater." Since the opening of defendants' theater, certain complications, owing to the use of the name "Garrick," have arisen between the parties; such as bills intended for the one being sent to and received by the other; passes intended for one have been presented to the theater of the other and been dishonored; telephone messages intended for the Randolph street Garrick have found their way into the box office of the Milwaukee avenue Garrick; the bill boards of the Milwaukee avenue concern have been posted over with the posters of the Randolph street concern, to the obliteration of the announcements of the former.

Defendants at the time of the filing of the bill had no other theater operated or owned by them known or called by the name of "Garrick." At the time defendants concluded to call their Chicago theater by the name of "Garrick," there was no theater in Chicago by that name. At the time they opened the Dearborn theater under the name of "Garrick" complainant's theater under that name had been in operation nine months.

OPINION.

HOLDOM, J. (after stating the foregoing facts):—

At the time complainant adopted the name of "Garrick Theater" to designate his place of amusement he had a perfect legal right to do so and in so doing neither interfered, nor trespassed upon the right of any other person in Chicago. It became and was the only "Garrick Theater" in Chicago. His legal right to exclusively use and maintain this name for his theater must be tested under that branch of the law designated as "Trade Marks or Trade Names," the principles of the former being applicable to the latter and resting for their

maintenance upon the same correlative legal right and equitable principle.

Is the complainant entitled to maintain this right to the exclusion of the defendants within the limits of the city of Chicago, or may defendants share that right with him? If it can be so maintained it must find its support in primary actual use as distinguished from an adoption coupled with an intent to actually use at some time in the future.

All the authorities decide, wherever the question has been presented for adjudication, that to entitle one to the use of a trade-mark or name, two conditions must exist: first, adoption of the name or mark, and second, its actual use; and the latter is as essential as the former to confer the right. *Kathreiner's Malzkaffee Fab. v. Pastor Kneipp Med. Co.*, 82 Fed. Rep. 325.

If a trade-mark, the emblem or symbol must be attached to the article designated to be protected, and if a trade name, then such name must be actually used in connection with the establishment which it is intended to designate, be it a hotel, theater, or business house. *Candee, Swan & Co. v. Deere & Co.*, 54 Ill. 439; *Hazleton Boiler Co. v. Hazleton Tripod Boiler Co.*, 142 Ill. 494-507; *Bolander v. Peterson*, 136 Ill. 215-217.

Paul on Trade Marks makes the following definitions in sections 160 and 172: "A trade or a commercial name is the name under which a business is carried on, or by which it is designated, or the name of a place at which a business is located. * * * A trade name should be considered and treated as a trade mark."

The supreme court of California applied these definitions in deciding *Woodward v. Lazar*, 21 Cal. 448, colloquially referred to as the "What Cheer House Case." It said on page 451: "It has been decided, and with good reason, that the name established for a hotel is a trade mark, in which the proprietor has a valuable interest, which a court of chancery will protect against infringement." The legal principle here announced is applicable with as much force to the theater of complainant in the case at bar, and is a controlling principle.

In fact, no well-authenticated case within my knowledge holds to the contrary.

The only case cited to support defendant's contention that the intention to adopt a name preserves the right to the one who, following on such declared intention, in fact does adopt such a name, is the case of *Kingsley v. Jacoby*, 20 N. Y. Supp. 46. At the time of the institution of the action Kingsley had in course of construction on a prominent thoroughfare in New York City, a hotel under plans designating it as the "Holland House." Kingsley at that time had a wide and extended reputation as a caterer and the hotel at that time was well known in New York as the "Holland House." The defendant, Jacoby, a dealer in cigars, registered a brand of cigars as "The Holland House Boquets," claiming in defense that he did so because some of the tobacco of which they were made, was purchased from Holland houses engaged in the tobacco business—which the court characterized as a "disingenuous afterthought" in the light of his letter to Kingsley, in which he said "the well known and just deserved popularity of your hotel has served as an inducement for me to apply its name, so widely known, to one of my new and best brands of cigars." Nothing said by the court in its opinion can be construed as holding that Kingsley was protected in the use of the name "Holland House," because of an expressed intention to so call his hotel. The name had been actually applied to the hotel, and the court said in its opinion "that it was well known in the City of New York as 'Holland House.'" However, the decision rested on the principle of unfair competition. Jacoby held himself out to the public as selling Holland House cigars for the purpose of profiting in their sale by reason of the well known reputation of that house for the excellent quality of the things emanating from it. This was a fraud in fact, as the Holland House had nothing whatever to do with Jacoby's so-styled brand of cigars.

It is insisted on the part of the defendants that complainant has not and can not suffer any pecuniary loss by reason of their operating their theater under the name of "Garrick,"

and that if any injury does result it is damage without injury, and that it therefore follows complainant is not entitled to invoke the relief here demanded.

It is true that complainant is not seriously menaced with financial loss by reason of defendants designating their theater as the "Garrick" in violation of the right of complainant to the exclusive use of that name for the Milwaukee Avenue Theater. Yet the evidence shows beyond controversy that complainant is inconvenienced, interfered with and annoyed in the conduct of his theatrical enterprise because of the existence of these dual theaters with the same name.

If the right to the exclusive use of the name "Garrick" by complainant is established, then aside from the question of his financial loss by reason of the invasion of such right by defendants, he would on the ground of inconvenience, interference and annoyance, thus resulting to him, be entitled to the relief here sought, regardless of the other question, whether the right to the use of such name may be regarded in law as a property right or not.

By complainant's adopting and actually using in the conduct of his theater the name "Garrick" he acquired a trade name or mark therein which was neither divested nor impaired in any way, by defendants' expressed intention prior to such use to so call the Dearborn Theater when they should in the future come into possession of it, nor by their afterward calling it by that name. Neither the advertised intention of defendants so to call their theater prior to complainant's actually using the name "Garrick" as the name of his theater, nor by, after such adoption and use by complainant of that name, applying the name "Garrick" to their theater, was the right of complainant impaired, nor did the defendants by either or both of said acts become vested with any right to so use the name "Garrick" as against the right of complainant or to use the same in the modified form "Garrick, formerly Dearborn," without the consent of complainant, or against his protest.

A decree may be entered enjoining defendants as prayed, from using the name "Garrick," or any modified form

thereof in which the name "Garrick" appears, in either the designation or conduct of their theater on Randolph street, Chicago, formerly known as the "Dearborn Theater."

NOTE.—An appeal was taken in the above case to the appellate court for the First District of Illinois. Thereafter the appellee was adjudicated a bankrupt and the trustee in bankruptcy was substituted as appellee. The appellant thereupon purchased in the bankruptcy proceedings the right to use the name "Garrick Theater." Error was thereupon confessed in the appellate court by the appellee and the case was reversed without any consideration of the questions involved. The above decision is therefore a final one and in principle it is unreversed.—Ed.

(Circuit Court of Cook County. In Chancery.)

The Heirs of Hiram Hastings, Deceased,

VS.

Daniel G. Dorrance and William D. and Erwin D. Messenger and Wives.

1. **HOMESTEAD—WHEN RIGHT OF CEASES.** The mere fact that a party involuntarily ceased to occupy a homestead does not show that he intended to abandon the same. The presumption of the law is to the contrary.
2. **HOMESTEAD EXEMPTIONS—ASSERTION OF LACHES DOES NOT RUN AGAINST.** Inasmuch as the law exempts the homestead it is unnecessary for the debtor to manifest any intention to avail himself of its benefits. The ordinary rules of laches are also inapplicable.
3. **SALE OF HOMESTEAD—NOT IN COMPLIANCE WITH STATUTE.** The sale of a lot of ground occupied as a homestead, where the sale is not had in accordance with the homestead law, is inoperative and void and passes no title.
4. **SAME—VOLUNTARY CONVEYANCE WITHOUT RELEASE OF HOMESTEAD.** The voluntary conveyance of the homestead lot, without release of the homestead as provided by the homestead act, passes a title which becomes operative upon the abandonment of the homestead, and where the lot is worth more than \$1,000, it passes the title subject to the homestead. There is a distinction between the case of a voluntary conveyance and a conveyance by operation of law.

5. JUDICIAL SALES—EQUITIES ARISING OUT OF. No equity can arise out of a purchase at a void judicial sale.
6. JUDICIAL SALES—LIEN ON HOMESTEAD—EXCESS OVER \$1,000. The statutory right to subject the excess over \$1,000 in a homestead to the satisfaction of a judgment does not constitute the judgment a lien on such excess.
7. SAME—LIEN AS TO EXCESS—GENERAL STATUTE. Nor does any such lien exist under the general statute as to judgments.
8. STATUTORY CONSTRUCTION—MODE PRESCRIBED BY STATUTE EXCLUSIVE. Where the statute specifies the particular mode in which a lot of ground used as a homestead may be sold, all presumption that the legislature intended it should be sold in any other way is excluded.
9. JUDICIAL SALES—PURCHASER AT, ACQUIRES NO EQUITABLE TITLE. A purchaser under an execution sale which is merely a statutory proceedings, acquires no equitable title.
10. EQUITABLE TITLE—DEFINED. An equitable title is where one has the right by reason of some equitable doctrine to demand a conveyance of the legal title to land held by another.
11. HOMESTEAD—EXECUTION SALES OF UNDER—NOT IN COMPLIANCE WITH STATUTE—RIGHT OF PURCHASER TO HAVE HOMESTEAD SET OFF OR IF INDIVISIBLE TO COMPEL DEBTOR TO ACCEPT \$1,000. Where a sale by execution is had of a lot of land occupied as a homestead, which sale was not had in accordance with the statute in relation to homesteads, the court will permit the purchaser to have the homestead set off as against the judgment debtor, or if indivisible to be declared the absolute owner upon the payment of \$1,000 to the judgment debtor.
12. HOMESTEAD—SALE UNDER EXECUTION AT A SACRIFICE NOT IN ACCORDANCE WITH STATUTE. If property subject to a homestead is sold at a sacrifice, by reason of the irregularity of selling without setting off the homestead, the purchaser should permit his sale to be set aside upon the payment of his judgment.
13. SAME—RIGHTS OF SUBSEQUENT PURCHASER. But where the purchaser re-sells the property to a *bona fide* purchaser, the court will permit the setting aside of the sale on the condition that the judgment debtor place the subsequent purchaser in *statu quo*.
14. JUDICIAL SALES—WHEN SET ASIDE FOR IRREGULARITIES. Where the judgment creditor sells a lot of land subject to a homestead, the fact that it is susceptible of division into two parts and should have so been offered for sale by the sheriff when taken into connection with the fact that the judgment creditor failed to notify his debtor that the homestead in which he had a large equity had been sold, makes such a case of wrong oppression and inequitable conduct on the part of the creditor that when

taken into connection with a gross inadequacy of price, calls loudly to a court of equity for relief.

15. JUDICIAL SALES—PURPOSE OF. The object of the statute in permitting a sale of real estate upon a judgment, is to enable a creditor to collect his debts, and not to enable him to speculate off his debtors misfortunes.

Bill and amended bill. Cross-bill and bill of review. Heard before Judge Murray F. Tuley. The facts are stated in the opinion.

F. W. Forch, Jr., solicitor for complainant.

Sleeper & Whiton, solicitors for defendant Dorrance.

Pliny B. Smith, solicitor for defendants Messenger.

TULEY, J.:—

In 1843 Hiram Hastings purchased the E. ½ of lot 2, block 5, frac. sec. 15, addition to Chicago, and occupied the same as a homestead until the buildings thereon were destroyed by the big fire of 1871.

In the fall of 1875 he commenced the erection of the present building thereon, and before its completion occupied a portion of it for his homestead until his decease in the year 1880. Since then his widow has been and is now occupying the same, claiming homestead rights therein.

In the superior court of Cook county, on the 12th day of January, 1876, Edwin D. Messenger obtained a judgment against Hastings and sold the said E. ½ of lot 2, May 6, 1876, with the buildings, for the sum of \$350, that being the amount of the judgment, interest and costs. The building on the lot covered the entire front, was four stories in height and in appearance was two distinct buildings of 40 feet front each, with stores below and separate entrances and stairs leading to the upper stories. Although the property had been mortgaged as two separate 40 feet lots, and was clearly susceptible of a division into two parts, it was sold *en masse* and without regard to the homestead rights of Hastings, if any he had. Whether or not Hastings had a homestead in this property at the date of this judgment is about the only question of fact in this case..

Without going into any analysis of the evidence, I will only

state my conclusion, which is, that he had at that date a homestead right in the lot and buildings thereon. His ceasing to live there in 1871, was involuntary, and his intent to retain the lot as a homestead must therefore be presumed. Although there is some evidence to show an abandonment, yet the weight of evidence tends to aid the presumption of the law of an *animus revertendi*. *Howard v. Logan*, 81 Ill. 383. My conclusion also is, that he was actually occupying the new building as a homestead at the date of the judgment.

On the 18th day of August, 1877, the execution sale ripened into a deed to Edwin D. Messenger, the purchaser at the sale. He quitclaimed an undivided three-fifths interest to his partner, William D. Messenger, on the 20th day of August, 1877, and the two joined in a deed to the defendant Dorrance, on the 30th of same month, which was filed for record in a few days thereafter. The consideration of the last mentioned deed was \$2,123.42 cash, and the balance of the consideration of \$13,000, was prior indebtedness.

The sheriff made a demand of payment before the levy, but there is no evidence to show that Hastings knew of the levy and sale or subsequent deeds thereunder, until a few days after the record of the deed to Dorrance.

This bill was forthwith filed by Hiram Hastings, to set aside the levy, sale, sheriff's deed and the subsequent deeds as clouds upon his title, upon the ground that the premises were occupied as a homestead, and none of the requirements of the statute as to the appointment of commissioners to set off the homestead, etc., having been complied with, the same was unauthorized and void; and also upon the further ground that the sale was irregular inasmuch as it was sold *en masse*, when it was susceptible of division into two parcels.

The defendant Dorrance files a cross-bill and offers to pay \$1,000 for the homestead interest, if the court finds there was a homestead interest, and prays that he may be declared the owner of the property free therefrom.

The following questions of law arise:

1st. The lot of ground being occupied by Hastings as a homestead, and none of the requirements of the homestead act having been complied with, was the sale unauthorized and

void, and therefore failed to pass any right, title or interest to the purchaser at that sale?

2d. The equity of Hastings in the property—the same being under mortgage—being of the value of \$25,000 at the time of the sale, is Dorrance entitled to the relief prayed by his cross-bill?

3d. If the sale passed the title to the property subject to the \$1,000 homestead interest—does the fact that the sale was *en masse* and not in parcels entitle the complainants to have the sale and deeds set aside as against Dorrance, and if so, upon what terms?

4th. Have the complainants been guilty of laches?

It is evident that the decision of the first point in favor of complainants would render it unnecessary to decide the others, for if the execution sale was made without regard to the requirements of the homestead act, and therefore the sheriff's deed passed no title or interest in the property, it would be immaterial whether the sale was *en masse* or not. There could be no laches in asserting the exemption from levy and sale of the lot of ground occupied as a homestead.

"The law exempts the homestead, and the debtor is required to perform no act, to discharge no duty, nor even to manifest any intention to avail himself of its benefits. Hence the ordinary rules as regard laches, in parties failing to make their defense at law, or to bring suit in a reasonable time, are not applicable when homestead exemption claims are asserted." *Hubbell v. Canady*, 58 Ill. 425; *Pardee v. Lindley*, 31 Ill. 174, 186.

As to the effect of this sale under the execution, some thirty odd decisions have been cited, and I have studiously examined them all, and others not cited. I find that in the following cases bills have been filed to set aside sales under judgment, because the provisions of the homestead act were not complied with in making the sale, and the relief prayed for was decreed. *Green v. Marks*, 25 Ill. 221; *Hume v. Gossett*, 43 Ill. 297; *Conklin v. Foster*, 57 Ill. 104; *Hubbell v. Canady*, 58 Ill. 425. The sale was set aside on motion in *Stevenson v. Maroney*, 29 Ill. 532, and the right to have it done on motion

recognized in *Haworth v. Travis*, 67 Ill. 301. In *Kerr v. South P'k Comrs.*, 8 Bissell, 276, s. c. Fed. Cas. No. 7733, an execution sale of homestead was held void, on the authority of *Hartwell v. McDonald*, 69 Ill. 293. Sales were set aside upon bills filed in the following cases where there had been sales under foreclosure decrees, and in many of them the decrees went by default against the homestead claimant. *Hoskins v. Litchfield*, 31 Ill. 137; *Mooers v. Dixon*, 35 Ill. 208; *Cummings v. Burleson*, 78 Ill. 281; *Muller v. Inderreiden*, 79 Ill. 382; and on motion in *Moore v. Titman*, 33 Ill. 57.

In *Green v. Marks*, *supra*, the court says, "The legislature intended not only to free it (the lot of ground) from liability to sale, but from all lien while it remains a homestead." In *Hoskins v. Litchfield*, *supra*, where there had been a sale under a foreclosure decree without appointment of commissioners, etc., as required by the homestead act, the supreme court affirmed the decree of the lower court, "that the said premises stand in all respects as if no proceedings had been had under the mortgage."

In *Moore v. Titman*, *supra*, the court held that: If the premises ordered sold are worth more than \$1,000, the master must proceed like a sheriff on execution to sell in the manner provided by the statute. In *Mooers v. Dixon*, *supra*, after decreeing that the sale and the deed thereon be set aside, the master was ordered "to proceed to sell the premises in the mode pointed out by the homestead act."

In *Conklin v. Foster*, *supra*, the premises were worth more than \$1,000. There were two judgments, and the premises were sold under the senior judgment, and afterwards the owner of the homestead sold the premises to the junior judgment creditor. It was held, that "property thus situated is not liable to sale, and no lien by virtue of a judgment attaches to it," and "that the junior judgment creditor took the property free from all lien of the first judgment; a sale," says the court, "of such property being inoperative, the purchaser thereat takes no title."

In *Hartwell v. McDonald*, 69 Ill. 293, where the premises sold were worth more than \$1,000, the court says: "It is not

the mere homestead right of occupancy which is exempted from levy and forced sale, it is the lot of ground occupied as a residence. This court has uniformly held that a judgment is not a lien upon homestead premises. * * * It has been held that the property is neither subject to a lien, a levy or a forced sale under judicial process while occupied as a homestead; that it does not vary the result whether the premises are worth more or less than \$1,000, that if not worth more than that sum, the sale is prohibited, and if worth more, then none of the requirements of the statute having been observed in making the levy and sale, the sale is unauthorized, * * * property thus situated is held not liable to levy and sale on execution and such sales are held to be inoperative and void and that the purchaser acquires no title thereunder." And then cite with approval the case of *Green v. Marks, supra*, and nine other decisions of our supreme court as supporting the position taken.

The case of *Hartwell v. McDonald* is cited with approval in *Hartman v. Schultz*, 101 Ill. 437. And, it is again held, that "it is the lot of ground occupied as a residence which is exempt," and that where premises are not susceptible of division and exceed in value \$1,000, "a sale * * * is invalid unless the provisions of the statute * * * are complied with" in making the sale.

It would seem that no language could be clearer or more positive than that used in the cases last cited, and that there should be no doubt but that the sale of a lot of ground—without regard to its value—occupied as a homestead where the sale is not had in the manner provided by the homestead law, is inoperative and void and passes no title.

There are, however, decisions of our supreme court, which, it may be argued, hold that where the homestead lot exceeds in value \$1,000, a valid sale may be had of the excess of value over \$1,000, without appointing commissioners or complying with the other provisions of the homestead act.

Among those decisions are a certain class growing out of voluntary conveyances of the homestead lot, without in the deed or instrument conveying the property, releasing the

homestead in the manner provided by the act. Of this class are *McDonald v. Crandall*, 43 Ill. 231; *Coe v. Smith*, 47 Ill. 225; *Hewitt v. Templeton*, 48 Ill. 367; *Mix v. King*, 55 Ill. 434; *Eldridge v. Pierce*, 90 Ill. 474; *Hotchkiss v. Brooks*, 93 Ill. 386.

These decisions lay down the principle that a voluntary conveyance of the homestead lot, without release of the homestead as provided by the act, passes a title which will become operative upon the abandonment of the homestead, and in case the lot is worth more than \$1,000, it passes the title subject to the homestead.

The supreme court of the United States in *Black v. Curran*, 14 Wall. 463, in a case involving a title derived through an execution sale, (in Illinois), made without setting off the homestead, held, that the fee passed subject to the homestead, and comment on *Hewitt v. Templeton* and *McDonald v. Crandall*, *supra*, and *Coe v. Smith*, 47 Ill. 225, and say "if a conveyance by the occupant of the homestead, without the release of his right as required by law, has the effect to pass the title, regardless of the value of the premises conveyed and can be enforced so soon as the occupation of the homestead ceases, it is difficult to see why the conveyance by the officer of the law instead of the debtor should not have the same effect."

"And if as between two voluntary grantees, the first takes the land discharged of the homestead after its abandonment, although the second conveyance contains a release of the homestead and the first does not, why should not the same rule obtain when the property was sold on judicial process before the debtor conveyed it, * * * the only difference between a conveyance made by the judgment debtor who has a homestead, and by a sheriff under a sale on execution against the land, is, the one is the act of the party, the other, of the law—one a voluntary, the other an involuntary conveyance."

But in the case before cited of *Hartwell v. McDonald*, 69 Ill. 293, where precisely the same question was before our court as in *Black v. Curran*, 14 Wall. 463, our supreme court

comment upon, and expressly disapprove of that case and say, "Our court has always made a marked distinction between cases of voluntary conveyances by the homestead occupant, and those of compulsory conveyance by the officer of the law," * * * and also that "it has been held that the property is neither subject to a lien, a levy, or a forced sale under judicial process while occupied as a homestead; that it does not vary the result whether the premises are worth more or less than \$1,000; that if not worth more than that sum, the sale is prohibited by the statute, if worth more, then, none of the requirements of the statute having been observed in making the levy and sale, the sale is unauthorized," and cite, as supporting that doctrine, the following decisions of the court: *Green v. Marks*, 25 Ill. 221; *Fishback v. Lane*, 36 Ill. 437; *Silsbee v. Lucas*, Id. 462; *Blue v. Blue*, 38 Ill. 9; *Bliss v. Clark*, 39 Ill. 590; *Wiggins v. Chance*, 54 Ill. 175; *Hoskins v. Litchfield*, 31 Ill. 139; *Moore v. Titman*, 33 Ill. 357; *Wing v. Cropper*, 35 Ill. 256; *Conklin v. Foster*, 57 Ill. 104.

In addition to the decision of the U. S. Supreme Court in *Black v. Curran*, 14 Wallace *supra*, we have the following cases which are relied upon by the cross-complainant, Dorrance, as holding that there may be a valid sale of the excess in value over \$1,000 without first setting off the homestead and, that being so, that he is entitled to the relief prayed by this cross-bill.

The first is *Loomis v. Gerson*, 62 Ill. 11, in which it appears there was a judgment on fine of \$200 against the occupant of homestead, and upon execution the homestead was levied upon and sold upon the 21st of May, 1869, to Gerson, and two days after the sale, the judgment debtor sold the homestead premises to Loomis for \$1,800. Gerson's purchase ripened into a deed, and he paid off two mortgages upon the property. Loomis, the grantee of the homestead occupant, filed his bill to have the sale under the execution and sheriff's deed to Gerson set aside and declared void, upon the ground, that the premises at the time of the sale were a homestead, and that the requirements of the homestead act had not been

complied with in making the sale. There was a demurrer to the bill which was overruled, and decree setting aside the sale. The supreme court holds that the circuit court did right in overruling the demurrer, and say, "the sale, however, should not be absolutely set aside. All that the judgment debtor has a right to claim is \$1,000, and if the defendant prefers to pay that sum to the complainant, who stands in the shoes of the judgment debtor, he should be permitted to do so, and retain the title. For error in setting aside the sale absolutely the decree is reversed."

The case at bar would seem to be a parallel one to *Loomis v. Gerson*, except that in this case there are no mortgages paid off by the purchaser at execution sale. The decision in *Loomis v. Gerson* is not made to turn upon the right of subrogation, if any, or upon any equity growing out of the payment of the mortgages. In fact it would be difficult to see how that could make any difference in the rights of the holder of the execution title, if the mortgages were paid without the knowledge or consent of the person purchasing from the occupant of the homestead. The purchaser at the execution sale, either took title by such purchase or he took nothing, and it is difficult to see how he could take any title or interest by a purchase at a sale made without the requirements of the homestead being complied with, when such a sale was in the language of the prior decisions of the court unauthorized and void. How any equity could arise out of a purchase at a void judicial sale, it is rather difficult to discover.

This decision of *Loomis v. Gerson* was recognized in *Stevens v. Hollingsworth*, 74 Ill. 202, an ejectment suit based on a title derived through an execution sale, where the court says, "Where a bill in chancery is filed to set aside a sale, on the ground that the property sold was the homestead of the complainant, the chancellor may, undoubtedly, in the exercise of the equitable powers with which he is invested, cause the property to be divided and set aside the sale only as to so much as shall be found, if the property be divisible, of the value of \$1,000: or require the complainant, if the property be not susceptible of a division, to accept the \$1,000 for

his homestead, if the purchaser shall elect to retain it and pay the amount, as has been held in *Loomis v. Gerson, supra*."

Loomis v. Gerson cites no authority, *Stevens v. Hollingsworth*, in addition to *Loomis v. Gerson* cites *Linton v. Quimby*, 57 Ill. 271, which does not appear to be in point as the only question there was, whether the court below erred in refusing to set aside the sale as to four other lots, sold with the homestead lot, each lot having been sold separately. The court below did set aside the sale as to the homestead lot, although the evidence showed a value of \$3,500—or in other words a "surplus" of \$2,500.

The remaining case relied on by defendant is that of *Leopold v. Krause*, 95 Ill. 440.

The homestead had been sold on execution, the homestead act not being complied with in making the sale. The purchaser filed a bill to set aside certain deeds made by the judgment debtor as fraudulent and asked to be declared the absolute owner, the answer was, that the premises were a homestead, and the reply in argument was, that the homestead right was forfeited by the making of the fraudulent conveyances. The court after commenting on *Hartwell v. McDonald*, as holding such a sale void, say, that it was an action at law and followed the prior decisions of the court, which held, that the fee did not pass by such a sale; that "everything contained in that opinion must be limited in its application and meaning by a consideration of the case then under discussion;" that "the relief which may be had in a court of equity was not then under consideration," but was, in *Loomis v. Gerson*, 62 Ill. 11, and after quoting from that decision the court say, that *Loomis v. Gerson* was referred to with approval in *Stevens v. Hollingsworth*, 74 Ill. 202, and quote the language of the latter case, as hereinbefore recited; that the rule established in those two cases has never been directly disapproved or criticised since it was first announced; that "even were we dissatisfied with those cases, still they have become a rule of property, and we should hesitate to overrule them. But upon reconsideration of the question we think they are sustained by reason. A careful examination of the language of the statute will show, that it prohibits a

sale of the homestead only to the extent of the \$1,000 in value, and contains no prohibition of the sale of the surplus over and above that amount. * * * The provisions as to the manner in which an execution sale is to be made, are simply directory and not prohibitory. It is not declared that a sale without setting off the homestead shall be null and void. Undoubtedly the debtor may insist upon the statute being complied with, and may in apt time, no doubt, apply to a court of equity to set aside the sale whenever a noncompliance with the statute has *injuriously* affected him." The opinion then argues that the provision of the statute requiring the homestead to be set off is manifestly principally for the benefit of the judgment creditor, and suggests that such sale may pass an equitable title in the surplus of value and entitle the holder thereof to file a bill for setting off the homestead, or the appointment of commissioners to make a division "and perhaps for other equitable relief, yet this bill seeks no such relief;" that there is no prayer to set off the homestead, no offer to pay \$1,000; that "the complainant has come for the aid of a court of equity, he should have it only on equitable terms, * * * if by reason of the irregularity of selling without having the homestead set off, the property was sold at a sacrifice, complainant should permit his sale to be set aside upon payment of his judgment, if the parties in interest in the land are willing to pay the same."

I have reviewed and quoted thus liberally from the supreme court decisions, that it may be seen how irreconcilable they are. It is another illustration of the dilemma in which the *nisi prius* judge often finds himself in attempting to arrive at a conclusion from the decisions of our supreme court. If I decide in favor of the principles laid down in the first and by far the most numerous class of the decisions referred to, complainants are entitled to a decree setting aside the sale of this property upon the payment of \$350 with interest. If I decide in favor of the principles declared in the three decisions last mentioned, the defendant, Dorrance, is entitled to this property of the net value of \$25,000 to \$30,000 upon the payment of \$1,000.

Does the fact, that the act of 1873 created an estate of

homestead, whereas the prior acts only recognized an exemption, make any difference as to the principles of law, or the decisions governing the case? A construction of the new statute of 1873, is found in *Hotchkiss v. Brooks*, 93 Ill. 386, which was a bill filed by Hotchkiss against Sarah Brooks, to have her homestead interest in a lot which he acquired by deed from her husband, set-off, and if the property was not divisible, then that appraisers might be appointed, and if the appraisement should exceed \$1,000, then that defendant be required to take \$1,000 and surrender possession. Brooks had separated from his wife and abandoned the homestead. The property was appraised at \$4,750, and decree went in favor of complainant. The supreme court say "It is true the right conferred upon a party who occupies a tract or lot of ground as a homestead, under the act of 1857, was a mere exemption, and it is also true, that, by the act of 1873, an estate of homestead was created; but, aside from the fact that one is called an exemption and the other an estate, it might be difficult to determine the difference between the two, in so far as the rights and privileges conferred upon appellee in this case are concerned. Under the one statute, the rights conferred seem to be as great as under the other; and we perceive no reason why a decision made under the old statute would not be applicable under the new one."

The year before the decision last quoted, to wit: in 1873, Justice Scholfield in *Eldridge v. Pierce*, 90 Ill. 474, reviews the two acts of 1857 and 1873, in a very able manner, pointing out the effect of the change from an "exemption" to an "estate" of homestead. In that case, the occupant of the homestead lot made a mortgage without release of the homestead right, and subsequently made two other mortgages with release of homestead right. He subsequently surrendered possession to the last mortgagees. A bill was filed by first mortgagee to foreclose, who alleged that there had been an abandonment of the homestead and that therefore the second mortgagees were in all respects subordinate to him. The court referred to the prior statutes exempting from levy and forced sale, the lot occupied as a homestead and say "it was held

that this did not create a new estate, but simply an *exemption*; and where the holder of the homestead conveyed without relinquishing the exemption, he transferred the fee, but the operation of the deed was suspended until the premises were abandoned or possession was surrendered." *McDonald v. Crandall*, 43 Ill. 231; *Coe v. Smith*, 47 Ill. 225; *Hewitt v. Templeton*, 48 Ill. 367; *Hartwell v. McDonald*, 69 Ill. 293. And also, "that the exemption did not affect the rights of heirs or devisees," citing: 70 Ill. 263, 72 Ill. 24, 80 Ill. 84, and 76 Ill. 541. "The phraseology of the act in force July 1, 1873, leaves no room for doubt," says the court, "that the general assembly designed to change the law in both these respects. To meet the objection that the former acts created no new estate, it expressly declares that 'every householder,' etc., shall be entitled to an *estate of homestead* to the extent in value of \$1,000—thus creating a new estate; and, to meet the objection that the former exemption did not affect the rights of heirs and devisees, it declares that such homestead (*i. e.* the estate of homestead to the extent in value of \$1,000) shall not only be exempt from attachment, judgment, levy or execution, sale for the payment of debts, or other purposes, but that it shall also be exempt from the laws of conveyance, descent and devise, except as therein provided."

After commenting on the change made by the 4th and 6th sections, the court proceeds, "it would be difficult to employ language more clearly expressing that the householder is now invested with an estate, (one before unknown to the law of homestead), to the extent in value of \$1,000, which can only be incumbered or aliened in the mode prescribed by the statute. Where the property in which this estate exists exceeds in value \$1,000, the excess is plainly unaffected by the estate, that is to say, the excess is liable to the same lien of judgment, attachment, etc., and to be aliened in the same manner that other real property of the householder is. Where, however, the property does not exceed in value \$1,000, the estate embraces the entire title and interest of the householder therein, leaving no separate interest in him, to which liens can attach or which he can alien, distinct from the home-

stead." Also "that abandoning or surrendering possession pursuant to the conveyance of the property, is not an abandonment of the estate of homestead."

In the case of *Browning v. Harris*, 99 Ill. 456, which was a bill to foreclose a mortgage; there was no release of homestead property worth less than \$1,000, and no possession was given, nor was there any abandonment. Justice Mulkey reviews the new act, the effect of the change of the exemption to an estate, and affirms the doctrine of *Eldridge v. Pierce*, 90 Ill. *supra*.

Without desiring to criticise the supreme court, it appears to me that some confusion has arisen, in the decisions made under the homestead act, as it existed prior to 1873, by the statement in some of the decisions, of a principle unnecessary to the case before the court:—That where the value of the lot occupied as a homestead, exceeded \$1,000, a judgment was a lien upon the "excess" or "surplus" or "residue" or "overplus," over and above \$1,000, as in *McDonald v. Crandall*, 43 Ill. 231; *Haworth v. Travis*, 67 Ill. 301, and others. If the judgments were a lien on the lot of ground, if worth more than \$1,000, why were they not a lien and capable of enforcement in the order of their priority, when the lot of ground worth less than \$1,000 was abandoned as a homestead? Our supreme court following the logical sequence of the doctrine declared in *Green v. Marks*, held where there were two judgments and the debtor abandoned the homestead, not the senior judgment, but that the junior judgment creditor who had made the first levy would be entitled to priority. *Bliss v. Clark*, 39 Ill. 590.

Whatever may be the effect of the change of the law making what was before an "exemption" an "estate of homestead" as to the "excess" in value over \$1,000, I think it must be conceded, that it was not correct to call the statutory right to subject, in the manner pointed out by the statute, this "excess" or surplus value to the satisfaction of the judgment a lien upon such excess or surplus.

It was no more a lien than is the right of a mechanic to enforce a claim against a building, a lien, until it is judicially

ascertained and declared to be such,—it is no more a lien than is a judgment in Cook county a lien on lands of the debtor in Kane county, yet the latter may be sold upon the judgment in the mode pointed out by the statute; or than is a judgment a lien on personal property.

As Justice Walker says, in the leading and very able decision upon the homestead law, *Green v. Marks, supra*, the only right to proceed against the lot of ground occupied as a homestead is given by the statute and “the statute is silent as to any lien.” The proceeding to sell the lot of ground occupied as a homestead is purely a statutory proceeding.

The title to land could not be divested by any proceeding upon a judgment at common law, and the right to divest a debtor of his title to the lot of ground occupied as a residence where its value exceeds \$1,000, being a purely statutory right, the mode pointed out by the statute and none other, must be pursued.

Nor does the fact that the new statute creates an estate of homestead in my opinion make a judgment a lien on the excess of value over \$1,000. The general assembly in passing the act were legislating as to the manner in which the lot of ground occupied as a homestead might be aliened, pass by devise or descent, or be sold upon judgment or decree, and as to the best means of preserving the homestead to the debtor, his wife and family.

Having failed to declare a judgment or decree to be a lien on the lot or any portion of it, it can only become a lien on the excess or surplus value by virtue of the general statute making judgments and decrees liens upon all the real estate of the debtor, but where the legislature singles out particular property and legislates as to that, can it be said that the statute provisions as to liens on the real estate generally of all debtors shall be held to apply to that particular property? I think not! If the lien arises as to the surplus value by reason of the general statute as to judgment liens, I can not see why—as the homestead interest is a conditional estate liable to cease upon abandonment—the judgment is not also

a lien upon the fee, subject to the homestead without regard to the value of the homestead.

It does not, however, necessarily follow that if the judgment is a lien on the interest of the debtor, which is in excess of \$1,000, the value of the homestead interest, that such property or such excess can be sold in any other manner than that provided by the homestead act.

A specification of the particular mode in which the lot of ground used as a homestead may be sold on execution, where its value exceeds one thousand dollars, excludes all presumption that the legislature intended it should be sold in any other manner.

It will be noticed, that while the general assembly changed the old law by creating an estate of homestead in place of an exemption, yet in those section (now sections 9, 10, 11 and 12 of the law of 1873) relating to the sale on execution where premises occupied as a homestead exceed in value \$1,000, no change was made. All the prohibitions against the sale of the lot for a less sum than \$1,000, and all the requirements as to setting off the homestead, if it can be done—if not, then the appraisement to be made; notice to be given to the debtor to pay on the judgment the excess of appraisement over \$1,000 within sixty days—all remain in the new law precisely as in the old law.

In this regard the decisions under the old statute holding the sale, without complying with the homestead act, to be unauthorized and void and to pass no title, are just as applicable under the present statute as under the prior ones. While there is some language in the opinions in *Eldridge v. Pierce*, *supra*, and *Browning v. Harris*, 99 Ill. 456, construing the new homestead act of 1873, which appears to be to the effect, that the surplus value may be sold without regard to the homestead act, yet in both those cases the conveyances were voluntary, and the question as to the right to sell the surplus without first setting off the homestead, or if indivisible, having an appraisement, etc., was not before the court.

I confess that I am utterly unable to comprehend the equities and equitable rights which the court appear to desire to

establish in the three cases in the 62, 74 and 95 Illinois. I can not understand how a purchaser under an execution sale, purely a statutory proceeding, can acquire an "equitable title" to the surplus in value over \$1,000. It appears to me, that where a judgment debtor has a legal title to land, that the title acquired by a purchaser at an execution sale of that land must be a legal title and can not be an equitable title. He acquires a legal title, or he acquires no title. A legal title passes or no title passes. An equitable title is where one has the right by reason of the application of some equitable doctrine to demand a conveyance of the legal title to land held by another. As for instance, where a guardian has purchased property of his ward the day after he acquires his majority; and where one buys land, supposing he is acquiring the legal title, and the owner of the legal title silently and fraudulently stands by and sees him make the purchase.

What equitable maxim or doctrine can be invoked, which will make the sale of the homestead lot which is an unauthorized and void act, passing no title when the purchaser seeks to enforce it in a court of law, 69 Ill., a valid and authorized act passing an equitable title, 62 Ill., when the purchaser comes in to a court of chancery? How can any equity arise from or be founded upon, a violation of statutory provisions?

This doctrine that a sale of the lot occupied as a homestead, without setting off the homestead carries the title subject to the homestead right of \$1,000, asserted in *Loomis v. Gerson*, and *Stevens v. Hollingsworth*, *supra*, is declared in *Leopold v. Krause*, *supra*, to have become a rule of property,—what am I to do with exactly the opposite rule of property declared in more than a score of decisions commencing with *Green v. Marks*, *supra*, and ending with *Hartwell v. McDonald*, *supra*, and recognized and reaffirmed as good law in a case still later than the 95 Ill., to wit: *Hartman v. Schultz*, 101 Ill. 437.

It is a noticeable fact that in each of the three cases of *Loomis v. Gerson*, *Stevens v. Hollingsworth* and *Leopold v. Krause*, so much of the opinion as is in opposition to the hitherto well established rule of property, that such a sale as

was made in this case is unauthorized and void, will be found upon examination to be *obiter* of the court, or at least, so much in the nature of *obiter* as not to demand that it be followed, certainly not, in opposition to the long line of cases cited, *ante*, holding a contrary doctrine. In *Loomis v. Gerson*, the owner of the homestead after judgment had sold the property, and the purchaser applied to have the sale set aside absolutely. In *Leopold v. Krause, supra*, the bill was filed by a purchaser under execution to set aside certain conveyances made by the homestead occupant, as fraudulent, while the other case of *Stevens v. Hollingsworth*, was an action of ejectment, and the question as to what relief could be had in equity was not before the court.

So that as yet, the supreme court has never sustained a bill by a purchaser at an execution sale, made without following the requirements of the homestead act, seeking as against the judgment debtor, to have set off the homestead, or if indivisible, to be declared the absolute owner, and entitled to possession on the payment of \$1,000. Until the supreme court has sustained a decree granting that specific relief, I do not feel called upon to follow the doctrine laid down in the three cases commented upon, in opposition to the rule of property established by so many of its other decisions, and so much opposed to my own judgment.

The case of *Kerr v. S. P. Com'rs*, 8 Bissell, 276, Fed. Cas. No. 7733, was upon a bill in chancery, and in that case the U. S. court followed *Hartwell v. McDonald, supra*. That decision has since been affirmed by the supreme court of the United States, and as before stated, our own supreme court have again recognized the doctrine of *Hartwell v. McDonald* upon a bill in chancery to set aside the sale of the homestead, in the case of *Hartman v. Schultz, supra*.

The cross-bill in this case will give the supreme court the opportunity, upon a bill praying the specific relief, of deciding, whether on an execution sale, made without complying with the Homestead Act, the homestead occupant can be turned out on the payment of the \$1,000.

The court in *Leopold v. Krause, supra*, has held in oppo-

sition to a long line of prior decisions hereinbefore referred to, that the provisions of the homestead act, as to the setting off the homestead and the appointment of commissioners, where the value of the lot exceeds \$1,000 are merely directory, and not mandatory, but have not held, that section 9 of the act which reads as follows: "No sale shall be made of the premises on such decree or execution unless a greater sum than \$1,000 is bid therefor" is also merely directory. The case of *Hartman v. Schultz, supra*, holds, that it is prohibitory of any sale, except for a greater sum than \$1,000, and I think any court considering the strong language forbidding the sale in section 9, in connection with sections 10, 11 and 12, would be justified in this case, where the bid was only \$350, in following *Hartman v. Schultz, supra*, rather than *Leopold v. Krause, supra*, and in pronouncing this sale void, passing no title.

But even if I felt compelled to follow *Leopold v. Krause*, relief might be granted the complainant in this cause. That case qualifies the doctrine of *Loomis v. Gerson, supra*, and *Stevens v. Hollingsworth, supra*, by holding, that if the property is sold at a sacrifice, by reason of the irregularity of selling without setting off the homestead, the purchaser should permit his sale to be set aside upon the payment of his judgment. Not only was this property worth, net, \$25,000 to \$30,000, sold for \$350, but no such sale, it can be supposed, would have been permitted by Hastings, had an appraisalment been had, and the sixty days prior notice given to him, as provided by the homestead act. As Dorrance has purchased since the sheriff's deed was made, having no other notice than that derived from the occupation of the Hastings, the relief could only be granted, on condition that the complainants pay him the amount of cash paid by him, \$2,132, and interest, to which extent only would he be considered a *bona fide* purchaser for value.

But I prefer to present the case to the supreme court, whether or not, such an execution sale is not both at law and in equity unauthorized and void and "passes no title."

As to the other points it is unnecessary to decide them; but

I will say that I have carefully considered all the authorities cited, and am of opinion, that if the judgment creditor could sell the lot of ground subject to a homestead as this was sold, the fact that it was susceptible of division into two parts, and should have been so offered for sale by the sheriff, when taken in connection with the fact, that a part of the building was occupied as a homestead and with the fact that the judgment creditor who became purchaser, carried on business within 200 feet of the lot sold, and knew Hastings, and saw him every few days, but failed to notify him that his homestead, in which he had an equity of at least \$25,000, had been sold and bought in by him for \$350, makes such a case of wrong, oppression and inequitable conduct on the part of the creditor, that taken in connection with the gross inadequacy of price, calls loudly to a court of equity for relief. It is a case that falls clearly within the principles laid down by our supreme court in *Morris v. Robey*, 73 Ill. 462; *Hay v. Baugh*, 77 Ill. 500; *Bradley v. Luce*, 99 Ill. 234; *Cassidy v. Cook*, 99 Ill. 385. The object of the statute in permitting the sale of real estate upon a judgment, is to enable a creditor to collect his debt, and not to enable him to speculate off his debtor's misfortunes.

Let the decree be prepared setting aside the execution sale and deeds issued upon and subsequent thereto; also setting aside the satisfaction of the judgment, and requiring the complainants to pay into court the amount bid at the sale, \$350, with interest thereon, cross-bill to be dismissed; each party to pay his own costs.

(Superior Court of Cook County, In Chancery.)

Bardeen Paper Company, et al.

vs.

The Western Coated Paper & Card Company, et al.

(1903.)

1. CORPORATIONS—WHETHER STOCK FULL PAID. Where half of the capital stock of a corporation is issued in payment for the right to use a patented process for the manufacture of which

the corporation was formed, it was held that in the absence of fraud the stock must be considered as full paid even though the patented process was of an uncertain value.

2. **SAME.** The fact that part of the shares of stock of a corporation taken in exchange for the right to use a patented process, were distributed among promoters as a bonus, does not show that there was a fraudulent overvaluation of the patented process.
3. **DIRECTORS—FRAUD OF—PERSONAL PROFIT IN RELATION TO CORPORATE TRANSACTIONS.** Where a director of a corporation receives a number of the shares of the capital stock of the corporation from the person to whom the same were issued in exchange for certain patent rights, it was held that such shares were the property of the corporation and the director must account for their value.
4. **DIRECTOR—DEALING WITH CORPORATE PROPERTY FOR HIS OWN BENEFIT.** While a director of a corporation is not a technical trustee, his relation to the corporation is a fiduciary one, and he cannot deal with the corporate property for his own benefit, or use it for his individual purpose.
5. **SALARIES OF CORPORATE OFFICERS—WHEN ILLEGAL.** Where a salary is voted to a corporate officer by his procurement, or where his vote is necessary to pass the resolution the action is void and such officer can be compelled to refund. (See note 3.)

Dupee, Judah, Willard & Wolf, solicitors for complainants. *James D. Andrews*, of counsel.

Rubens, Dupuy & Fischer, solicitors for defendants.

STATEMENT.

HOLDOM, J.:—

The complainants, judgment creditors of the defendant corporation, whose judgments remain unpaid, and upon each of which executions have been duly returned by the sheriff unsatisfied, have brought this bill under section 49 of the chancery act and paragraph 8 of the corporation act, being a creditor's bill, upon the theory that the defendants Schmidt, Marquis and Pagenstecher are indebted to the defendant corporation for unpaid stock subscriptions and for money due to the corporation for salaries received by them as president, vice president and treasurer, respectively, under a void resolution passed by the board of directors of the company Jan-

uary 9, 1893. Pagenstecher has since deceased and the bill abates as to him.

Prior to February 9, 1891, Joseph Kayser had invented a process for coating paper on both sides, and had procured letters patent upon the same from the United States, number 445955. On that date his wife, Johanna Kayser, she being the owner, entered into a contract with Joseph Sachs and John W. Krueger to the effect that if they would, on or before the 9th of September, 1891, procure a corporation to be formed with a capital stock of \$100,000, and procure \$50,000 in cash to be paid to such company as part of its capital, and also procure \$50,000 of the shares of such company to be issued to her as full paid up stock, she would sell and assign said letters patent and would transfer 100 shares of such stock to John W. Krueger and 150 shares to Joseph Sachs and 100 shares to promoters of such company to be designated by Krueger and Sachs; that on the same day said Sachs and Krueger and Joseph Kayser, the inventor, made an agreement in writing wherein it was recited that the Western Coated Paper and Card Company, with principal offices at Chicago, was about to be incorporated under the laws of Illinois, with a capital of \$100,000, for the purpose of manufacturing and selling lithographic, chromo and other coated paper, and that Sachs and Krueger were to be two of the original incorporators, and they desired to secure the services of Joseph Kayser, and the said Kayser did agree to serve said Sachs and Krueger or their assigns in such business and to act as manager and superintendent of the factory of said contemplated company when the company was incorporated and \$100,000 of stock subscribed and fully paid, at a salary of \$4,000 per annum, payable in weekly installments, and also procure the services of his son, Alfred C. Kayser, as assistant superintendent at a salary of \$2,000 per annum, covenanting that said Kayser and his son were fully acquainted with the process of manufacturing coated paper, the employment to continue for five years, with a covenant that Sachs and Kayser might assign said contract to the contemplated company.

Through the efforts of Sachs and Krueger the defendant corporation was formed in April, 1891, with a capital stock of \$100,000, divided into 1,000 shares of \$100 each. At first the directors consisted of seven persons, viz., Krueger, Sachs, the defendants, Schmidt and Marquis, and Pagenstecher, James White and H. J. Smith. The following year the number of directors was reduced to five, White and Smith retiring. On the 13th of April, 1891, the defendant Leo Schmidt was elected president, Krueger, secretary, and Pagenstecher, treasurer, of the company. At that meeting by-laws were adopted, article VIII reading: "Salaries of all officers and employees of the company shall be fixed by the board of directors." On May 19, 1892, the defendant Schmidt was re-elected president, and A. N. Marquis elected vice-president, Pagenstecher, treasurer, and John W. Krueger, secretary.

At the directors' meeting of July 8, 1891, the following communication was read to the board:

"To the Western Coated Paper & Card Company.

GENTLEMEN: I am the owner of the letters patent of the United States of America for a new and useful improvement in the apparatus for coated paper, which letters patent are number 445955, dated February 23, 1891, which I agree to assign and transfer to you in consideration of your issuing to me \$50,000 worth of the capital stock of your company, said shares of stock being one-half of the entire capital, full-paid and non-assessable. In addition thereto I agree, with my husband, Joseph Kayser, and my son, A. C. Kayser, to deposit for your sole use with any reliable trust company, certain receipts or formulas used in coated paper.

Yours truly,

JOHANNA KAYSER.

The corporation record shows the following action taken upon said proposition: "Resolved, that we accept the proposition of Mrs. Johanna Kayser, in which she is joined by Joseph Kayser and A. C. Kayser, and the president and secretary of our company are hereby authorized and directed to issue to the said Johanna Kayser on her order said \$50,000 worth of stock of this Western Coated Paper & Card Com-

pany. Thereupon these receipts or formulas for using coated paper were sealed in presence of directors by Joseph and A. C. Kayser and placed with the Illinois Trust & Savings Bank with the following remarks on the sealed envelope: 'The within documents are deposited with the Illinois Trust Company by Joseph Kayser and A. C. Kayser and Western Coated Paper & Card Company.' "

Mrs. Kayser had theretofore subscribed for 500 shares of stock.

At this time Leo Schmidt was a director and president of the company, and had subscribed for \$10,000 of this stock and had also paid for \$10,000 of stock issued to Pagenstecher, who was his brother-in-law. An assignment of the contract of service with Joseph Kayser was made to the company by Krueger and Sachs and accepted by the company in writing, Leo Schmidt executing the acceptance as president in behalf of the company, and stock certificate No. 1 of the company for 500 shares was thereupon issued to Mrs. Johanna Kayser, dated July 1, 1891. That certificate was afterward surrendered and canceled and in its place fifty shares were issued to A. C. Kayser, 135 shares to Joseph Sachs, eighty shares to John W. Krueger, fifty-four shares to Leo Schmidt, thirty-five shares to John E. Wright, thirty-five shares to John White, thirteen shares to Fred C. Laird and thirteen shares to W. H. Lee. The fifty-four shares issued to Leo Schmidt were in the nature of a bonus for his having interested himself in subscribing to the stock of the company for himself and Pagenstecher 200 shares, and this understanding was had prior to the making of such subscription and prior to his election as a director and president of the company, and this subscription for two hundred shares of stock made the stock fully subscribed for.

One H. J. Smith failed to make good his subscription of \$5,000, and Leo Schmidt took \$2,000 of this stock and a Mr. Hutchinson the remaining \$3,000. Schmidt paid altogether \$22,000 to the company for his own, Pagenstecher's and \$2,000 of the Smith stock subscription. Of the shares of stock issued to Johanna Kayser, Leo Schmidt acquired from White,

Wright, Laird, Lee and Krueger 126 shares, for which he paid from \$80 to \$100 per share.

The president and vice-president to January 9, 1893, had served without salary. On that day at the meeting of the board of directors the following resolution was passed: "Resolved, that the president of the Western Coated Paper & Card Company receive a salary of \$5,000 per annum, and the vice-president a salary of \$500 per annum, and the treasurer an additional \$1,000." There were present at this meeting Schmidt, Marquis, Pagenstecher, Krueger and Kayser. The evidence shows that Krueger and Kayser refused to vote on this resolution. Krueger, the secretary, testified that as such he wrote up the record of the meeting and that the resolution as originally recorded by him was: "To compensate them for their capital invested, being ten per cent of their investment," and the record book shows an obliteration where this recitation appears; that originally, at the request of President Schmidt, he, Krueger, drew a pencil line through those words and that said resolution so appeared at the time he left the company, June 1, 1896. The resolution was carried by the votes of Marquis and Pagenstecher, Schmidt being in the chair as president, Krueger and Kayser refraining from voting.

OPINION.

The theory of complainant's bill as to over-valuation of the Kayser patent and secret process, in order to be maintained, must be infected with the "virus of fraud," and the question for determination is whether such allegation of fraud is sustained by the evidence.

At the time Krueger and Sachs undertook to exploit this patented and secret process for coating paper on both sides with a single passage through a coating machine, no mill manufacturing this kind of paper had been established west of New York and the New England states, and no one but Joseph Kayser and his son Alfred were available to superintend its manufacture and operate a mill of that character,

and the west was a promising field for the establishment and operation of such a mill.

Neither the patent, secret process, nor the services of the Kayzers combined, had any market or ascertainable value, and unless the process could be made available by the manufacture of coated paper in accordance with the patent and formula, they were certainly valueless. This condition must not be lost sight of; and to make this process of any value it needed to be developed by being put into practical operation; in other words, it was necessary to have constructed a mill with all necessary machinery and appliances to manufacture this coated paper. A common and ordinary way of bringing this about is through the organization of a corporation. To do so needs the time and services of some one or more persons capable of so doing and of interesting capital in the project. Without this latter the patent, formulas and ability of the Kayzers would be of no value. It was therefore necessary for the Kayzers to interest such men as Krueger and Sachs in the affair. Such being the condition the contracts of February 9, 1891, resulted. Sachs and Krueger as promoters were necessary to make available the ingenuity of Joseph Kayser, and to put into operation the invention and discovery in relation to "coated paper" which he possessed. Enterprises of this character in the industrial world are brought forth by the method which the Kayzers adopted, and through which the Western Coated Paper & Card Company was brought forth as a Chicago industry.

Did Schmidt and Sachs, Krueger and the Kayzers, honestly and in the exercise of reasonable judgment and in a modestly sanguine hope for the future, believe that the patent, formula and secret process and the services of the Kayzers for five years under that contract were worth \$50,000? Did they honestly, from the information which they possessed, in the exercise of a reasonable discretion, from the way matters and things appeared to them at that time, believe the project was feasible, and that the processes and the ability of the Kayzers to manufacture coated paper thereunder were reasonably worth \$50,000, and resting in that belief was this undertak-

ing finally consummated in the manner shown by the proof? Or, did these parties with an intent to overreach and obtain credit where credit ought not to have been given, fraudulently put a valuation upon these properties at the sum of \$50,000? Neither the actions of any of the parties directly or remotely interested, or the outcome of the venture prior to 1896, warrant any such conclusion. Because Johanna Kayser finally received but \$10,000 or \$15,000 of this stock is no evidence of over-valuation, and what she did with the balance of her stock in distributing it among the promoters who had been instrumental in bringing about the sale neither proves nor tends to prove the allegation of fraudulent over-valuation.

Taylor v. Walker, 117 Fed. Rep. 737, and cases there cited, are conclusive of this question, and are extreme cases on this point, and they find their support in the absence of proof of fraud. That there was an over-valuation gross and extreme in the *Walker Case* is admitted, and the manner of its occurrence is chargeable to Walker. The disastrous result which flowed from the gross over-valuation was none the less because the element of fraud did not enter into the over-valuation, but the parties were exculpated from the liability which would have ensued if the over valuation had been tainted with fraud. *Coit v. Gold Amal. Co.*, 119 U. S. 343.

And so in the case at bar, there is no evidence which points to fraud as a proven fact. At the most it is presumed by complainants from the fact that the promoters received for their services a part of Mrs. Kayser's stock. The undisputed fact that Leo Schmidt acquired 126 shares of the Kayser stock issued to others and that he paid therefor from 80 to 100 per cent of its face value, inhibits any assumption that Schmidt did not honestly believe that the corporation had received a *quid pro quo* for the \$50,000 of stock issued to Mrs. Kayser. The strongest evidence of a person's belief in value is not what he is willing to advise another to pay, but that which he will himself pay, and Schmidt comes up in the fullest measure to this test.

Fraud is never presumed, but must be proved. *Dexter v.*

McAfee, 163 Ill. 508; *Spring Valley Coal Co. v. The People*, 157 Ill. 543; *Swift v. Yanaway*, 153 Ill. 197, 203. I am unable to find from the proven facts that there was a fraudulent overvaluation of the property for which the \$50,000 stock was issued to Mrs. Kayser, and I do find, as a matter of fact, that the Kayser stock was in fact paid for in money's worth, and that there is not any financial liability resting on the Kayser stock. *Coffin v. Ransdell*, 110 Ind. 417; *Drummond's Case (In re China and Labuan Coal Company)*, L. R. 4, Ch. Ap. 772.

In *Drummond's Case*, *supra*, the court said: "If a man contracts to take shares he must pay for them, to use a homely phrase, 'in meal or in malt,' he must either pay in money or in money's worth. If he pays in one or the other that will be a satisfaction."

But to my mind another principle of law is applicable to this case and the relation of Leo Schmidt to it. It is true that at the time Schmidt and Pagenstecher subscribed for 200 shares of stock and Schmidt took by assignment twenty shares of the fifty shares subscribed for by H. J. Smith, Schmidt had made an agreement with Krueger and Sachs by which he was to receive fifty-four shares of the stock issued to Mrs. Kayser under her agreement with them, but such agreement at that time was but tentative; it needed for its consummation the action of the directors of the corporation of the Western Coated Paper & Card Company. No directors had to that time been elected, and had Schmidt not been elected a director, but had he simply been a stockholder, he would have been free to have accepted of the fifty-four shares without being accountable to the company therefor, as he then owed it no duty; but afterward, and on April 13, 1891, he was by the stockholders elected a director of the company, and on the same day at a director's meeting, elected president, and on July 8, 1891, at a meeting of the board of directors at which Schmidt, being president, presided, the proposition of Mrs. Kayser, her husband, Joseph Kayser, and son Alfred, was submitted and accepted, and in pursuance of that action at that meeting the 500 shares of stock were

issued to Mrs. Kayser. It is too elementary a principle to need citation of authority that no trustee can profit from his trust. It was Schmidt's duty as such director and president to make as good a bargain as possible with the Kaysers, and this fifty-four shares of stock so received by Schmidt must inure to the benefit of the corporation and be treated as unpaid stock, and as having been received for the benefit of the corporation, and he held to be indebted to the corporation for its face value at the time when he received it, and he must be held to be a debtor to the corporation in the sum of \$5,400 on July 8, 1891, and liable for interest thereon until the time of payment at the rate of five per cent per annum. *Hoffman v. Reichert*, 31 Ill. App. 558; *Same v. Same*, 147 Ill. 274.

The appellate court in deciding this case said (p. 562): "Hoffman, at the time he claims he took possession of the leasehold interest, was both a director of the company and its treasurer. As such he could not deal with the property of the company except as such officer * * * such possession was in law the possession of the corporation. While a director of a corporation is not a technical trustee, still his relation to the corporate property is, in its very nature, a fiduciary relation, and as such director he *can not deal with the corporate property for his own benefit, or use it for his individual purpose.* * * * The possession of a trustee is presumed to be the possession of the *cestui que trust.*"

The supreme court in deciding this case on a further appeal from the appellate court said (p. 279): "If Hoffman, before taking possession of the property, had resigned as director and treasurer, and notified the company that he would no longer act for it, a different question would be presented. But such was not the case. In speaking in regard to the duties of directors of a corporation, Morawetz on Private Corporations (vol. 1, sec. 511), says: 'The directors or trustees of a corporation, in accepting their appointment to office, impliedly undertake to give the company the benefit of their best care and judgment, and to use the powers conferred upon them solely in the interest of the corporation. They

have no right, under any circumstances, to use their official positions for their own benefit or the benefit of any one except the corporation itself. It is for this reason that the directors have no authority to represent the corporation in any transaction in which they are personally interested, in obtaining an advantage at the expense of the company. The corporation would not have the benefit of their disinterested judgment under these circumstances, as self-interest would prompt them to prefer their own advantage to that of the company.' "

By parity of reasoning the fifty-four shares of stock which Schmidt obtained of the Kayser stock was the property of the corporation of which he was a director and president, and he having converted it to his own use is liable for its value at the time of such conversion; in other words, it being the property of the company at that time, it was his duty to pay for it if he desired to retain it, and not having done so, he must do now what he should have done then. *Hoyle v. Plattsburgh & Montreal Railroad Co.*, 54 N. Y. 314.

In *Gilman, Clinton & Springfield Railroad Co. v. Kelly*, 77 Ill. 426, it is held illegal for directors of a railway company to become members of a construction company with whom they have made a contract to build and equip the road, so as to share in the profits, and if they do, they will in equity be compelled to account for the profits realized. In this case the directors were held as trustees for the stockholders and it was held a breach of duty to transfer the trust or to assume obligations inconsistent with that relation, or to place themselves in opposition to the interests of the stockholders. On page 435 the court said: "The law has absolutely inhibited the agent or trustee from placing himself in a position where his own private interests would naturally tend to make him neglectful of his obligations to his principal, or where his position would afford him an opportunity to speculate in the trust property. Accordingly, it is not indispensable there should be actual injury before the act of the trustee would be declared void, as being interdicted by the policy of the law."

The by-laws of the corporation authorized the payment of salaries to the officers of the corporation and provided that such salaries should be fixed by the directors. No provision was made for the payment of any salary to the president or vice-president until the meeting of directors on January 9, 1893. At this time the directors consisted of five persons, who were all present at the meeting. The corporation record does not recite who voted for or against the resolution. The record being silent on this question, evidence *aliunde* was introduced to prove this fact, and the evidence establishes the fact that Krueger and Kayser did not vote, and the resolution was therefore carried by the votes of Marquis and Pagenstecher on the theory that Schmidt did not vote, and that three were a quorum, and that the votes of Marquis and Pagenstecher were a majority of that quorum; but however that may be, it is immaterial to the solution of this salary question. The motive for voting a salary to the president and vice-president was originally stated upon the records to be: "*To compensate them for their capital invested, being ten per cent on their investment.*" This part of the record was obliterated and stricken from the record by the secretary after the reading of the minutes at the request of President Schmidt at the next meeting of the board of directors. If this be true, then the purpose of this resolution was not to pay for the services of the president and vice-president, but to give them an income upon their investments in the company, which theretofore had not paid any dividends. The treasurer's salary was increased by the same resolution as that in which the salary was voted to the president and vice-president; therefore, the votes of Marquis, the vice-president, and Pagenstecher, the treasurer, were necessary—Krueger and Kayser not voting—to carry the resolution, and the evidence clearly demonstrates that the salary resolution was passed at the instance and by the influence of Schmidt, the president. This action by the directors was illegal under the comparatively recent cases of *McNulta v. Corn Belt Bank*, 164 Ill. 427, and *Adams v. Burke*, 201 Ill. 395. The *McNulta Case* is squarely in point, and *Adams v. Burke* is equally so,

and the legal principle deducible therefrom is that a salary voted an officer of a corporation, by his procurement, or where his vote is necessary to pass the resolution, is illegal and void; and the infirmity in this resolution making it void is the fact that all of the parties voting for the resolution were interested in the salaries voted by it, and all the cases are uniformly to the same effect.

It therefore follows that the sums received by Schmidt and Marquis under this salary resolution were without warrant of law and illegal, and must be refunded. It is a demand due to the corporation which may be recovered by a receiver to be appointed in a proceeding of this character.

The pleadings may be amended to conform to the proof and to the findings, or if complainants shall elect not to amend, a decree may be drawn in conformity with this opinion, holding the defendants Schmidt and Marquis liable to account for the amount of money received by them, respectively, under the salary resolution of January 9, 1893, otherwise a decree may be drafted covering the stock and salary issues here decided.

NOTE.

1. An appeal was prayed and allowed in the above case, to the appellate court but such appeal was never prosecuted.

2. As to whether stock issued in exchange for patent rights, and as to whether stock issued as a "bonus," is full paid, see *Buda Foundry & Mfg. Co. v. Columbian Celebration Co.*, 1 Ill. C. C. 398, aff. 230 Ill. 373.

3. *Directors or officers cannot vote salaries to themselves where their vote is necessary to pass the resolution.* Where directors vote salaries to themselves as officers, such action is voidable where the vote of any of the interested parties or the votes of parties under their control is necessary to pass the resolution. *McNulta v. Corn, etc. Bank*, 164 Ill. 427, 448; *Adams v. Burke*, 102 Ill. App. 148, affirmed 201 Ill. 395; *Mallory v. Mallory*, 61 Conn. 131, 23 Atl. 703; 10 Cyc. 899, and cases cited. Cook on Corporations, § 657, p. 1507. And where concert of action is shown it is immaterial that the salary of each was fixed by a vote which of and by itself would have been proper if the vote of any of the parties interested in the scheme was necessary on each particular ballot. *Mallory v. Mallory*, 61 Conn. 131. But see, *McNab v. McNab*, 16 N. Y. S. 448 (criticized 10 Cyc. 899) and explained in *Kearns v. West Point*, 42 N. Y. S. 773.

Where a salary has been illegally declared, a court of equity will convert it into a fund at the suit of an injured stockholder, giving him his share as dividends where circumstances warrant. *Brown v. De Young*, 167 Ill. 549; *Adams v. Burke*, 102 Ill. App. 148, aff. 201 Ill. 395. "Where directors vote large pay to themselves, evidently in bad faith and with a view to depriving the corporation of more than a reasonable proportion of its net earnings a dissenting stockholder may file a bill in equity to have the amount recovered back." Cook on Corporations, § 657. Cited with approval in *Bizler v. Summersfeld*, 195 Ill. 147.

Combination of stockholders to divert property of corporation to pay themselves large salaries can be attacked in equity. *Sellers v. Phoenix Co.*, 13 Fed. 20; *Bizler v. Summersfeld*, *supra*. Equity has jurisdiction to determine whether or not the salary paid an officer is reasonable or not and to compel the repayment of the surplus. *Davis v. Davis*, 52 Atl. 717 (N. J. Eq.); *Lillard v. Oil Co.*, 56 Atl. 254 (N. J. Eq.); *Mitchell v. United Boxboard Co.*, 66 Atl. 938 (N. J. Eq.). Especially where voted by one holding majority of stock. *Lillard v. Oil Co.*, *supra*. A salary which takes all the profits and part of the capital stock is unreasonable. Cook on Corporations, § 657, p. 1507.—Ed.

(Circuit Court of La Salle County.)

The People, etc.

vs.

Frederick W. Mathiessen.

(1896.)

1. CITIES AND VILLAGES—DUTY OF MAYOR TO ENFORCE STATE LAWS.

Section 10 of article 2 of the city and village act of 1872 which provides that the mayor "shall take care that the laws and ordinances are faithfully executed" has reference only to city ordinances and not to state laws.

2. SAME "TAKE CARE" DEFINED. The provision of the city and village act that the mayor shall "take care" that the laws and ordinances are faithfully executed mean that the mayor shall be faithful and vigilant to carry such laws into effect.

3. SUNDAY CLOSING LAW—DUTY OF MAYOR TO ENFORCE. It is not the duty of a mayor of a city organized under the city and village act of 1872 to enforce the law of the state which prohibits the keeping open of tippling houses on Sunday.

4. **PALPABLE OMISSION OF DUTY BY MAYOR—WHAT CONSTITUTES.**
The palpable omission of duty referred to in section 14 of article 2 of the city and village act of 1872 which provides for the indictment of the mayor and others who shall be found guilty of a palpable omission of duty, etc., has reference to some duty imposed by the act of incorporation, or the city ordinances, or to some duty definitely described by the laws of the state.
5. **SUNDAY CLOSING LAW—REMEDY TO ENFORCE—DUTIES OF MAYOR.**
Any person may secure the prosecution of a violator of the Sunday closing law. The duty of prosecuting offenders is placed upon the states attorney. It is not the duty of the mayor of a city to personally detect offenders and enter complaint before a magistrate or grand jury.
6. **SAME—PLEADING—INDICTMENT—MEANING OF ALLEGATION THAT DEFENDANT WILFULLY PERMITTED OPENING OF TIPPING HOUSE.**
An allegation that defendant wilfully, etc., permitted the keeping open of a tipping house on Sunday cannot be accepted for more than that he suffered such house to keep open or did not interfere to prevent. A mayor has no power or authority to grant a permit or a license to keep open a tipping house on Sunday.
7. **SAME—DUTIES OF MAYOR TO ADOPT PRECAUTIONARY MEASURES TO PREVENT KEEPING OPEN OF TIPPING HOUSE ON SUNDAY.**
The mayor of a city is not required by any law to adopt precautionary measures to guard against the possibility or probability of a tipping house keeping open on Sunday.
8. **CRIMINAL CODE—SECTION 260—MALFEASANCE IN OFFICE—DUTIES OF MUNICIPAL OFFICERS UNDER.**
Section 260 of the criminal code which has relation to malfeasance in office, etc., of persons holding public office, imposes no duties on municipal officers. Their duties are prescribed by the city and village act.

Motion to quash indictment. The facts are stated in the opinion.

BLANCHARD, J.:—

This is an indictment presented against Frederick W. Mathiessen as mayor of the city of La Salle, presumably, under section 14 of art. 2 of an act entitled "An act to provide for the incorporation of cities and villages," wherein it is provided, "In case the mayor or any other municipal officer shall at any time be guilty of a palpable omission of duty, he shall be liable to indictment and fine. * * *"

The motion to quash the indictment presents for adjudication an issue of law, namely, according to the pleading and facts therein stated, was the defendant guilty of a palpable omission of duty in his office of mayor of the city of La Salle?

Each count of the indictment (six in all) alleges, that it was the duty of the said Frederick W. Mathiessen, as mayor of the city of La Salle, to take care that the laws of the state of Illinois in the said city of La Salle were faithfully executed. This allegation is not one of fact but is simply the conclusion of the pleader and is equivalent to an allegation, that it was the duty of Frederick W. Mathiessen as mayor of the city of La Salle to take care that the law of the state of Illinois, which provides, "whoever keeps open any tippling house, or place where liquor is sold or given away, upon the first day of the week, commonly called Sunday, shall be fined not exceeding \$200," was faithfully executed in the said city of La Salle; for the breach of the alleged duty relates specifically to said law. In the first count it is alleged that certain persons named, some forty or more, "are the keepers of tippling houses or places where liquor is sold in the said city of La Salle." In the second count it is alleged, "one Palmyra Pierard was the keeper and owner of a certain tippling house or place where liquor is sold at and within the said city of La Salle." A similar allegation is contained in each of the other counts, and each of said counts contains an allegation in substance, that "said Frederick W. Mathiessen, mayor of the said city of La Salle as aforesaid, not regarding the duty of his office, unlawfully, wilfully, knowingly and contemptuously permitted the said ——— to keep open their or his tippling house or place where liquor is sold in said city of La Salle on the ——— day of ———, being the first day of the week, commonly called Sunday."

In logical order, the first question presented for our consideration on the motion to quash the indictment and each count thereof, is the alleged duty of the mayor "to take care" that the law of the state of Illinois prohibitory of open tippling houses on Sunday in the city of La Salle, is faithfully exe-

cuted. Is such a duty specially imposed by law upon the mayors of cities? From what source shall we ascertain the duties of mayors as such? Manifestly, in the first instance, from the charter creating the municipality.

Referring to the charter, the first article thereof relates to the procedure by which cities and villages may be incorporated. Article two thereof creates the office of mayor and prescribes his powers and duties, and special provision is made for the imposition of penalties for misconduct, etc. Section 1 of said article provides that the chief executive officer of a city shall be a mayor. Sections 2 and 3 relate to vacancies in said office; section 4 relates to mayors, *pro tem.*; section 5 to vacancies by removal. Section 6 provides: "The mayor shall preside at all meetings of the city council, but shall not vote except in case of a tie, when he shall give the casting vote." Section 7 clothes the mayor with power to remove any officer appointed by him under certain limitations. Section 8 grants to the mayor the same powers within the city limits conferred upon sheriffs to suppress disorder and keep the peace. Section 9 relates to power to release persons imprisoned for violation of any city ordinance. Section 10. "He shall perform all such duties as are or may be prescribed by law or by the city ordinances, and shall take care that the laws and ordinances are faithfully executed." Section 11 confers power to examine records, etc. Section 12 relates to his annual message to the council. Section 13 confers the power to call on male inhabitants to aid in enforcing the laws and ordinances and to call out the militia to aid in suppressing riots and other disorderly conduct, etc. Section 14 provides, "In case the mayor or any other municipal officer shall, at any time, be guilty of a palpable omission of duty, or shall wilfully and corruptly be guilty of oppression, malconduct or misfeasance in the discharge of the duties of his office, he shall be liable to indictment," etc. Section 15 empowers the mayor to appoint competent persons to revise the ordinances.

It may be assumed that five of the sections of article 2 impose imperative duties on the mayor, and in considering the

scope and nature of said duties, we must keep in mind that the mayor is the chief executive officer of the municipality, an office created for municipal purposes only. His duties are purely executive and administrative. He possesses no judicial or legislative functions or powers. Said section 6 requires the mayor to preside at all meetings of the city council but he cannot vote upon any law or ordinance or other question except in case of a tie, when he shall give the casting vote. If the mayor should persist in refusing to so preside he would be guilty of a palpable omission of duty. Section 8 requires the mayor to exercise the power conferred on sheriffs to suppress disorder and keep the peace within the city limits. What are the powers conferred on sheriffs in that regard?

Section 17 of the law in relation to sheriffs provides: "Such sheriffs may arrest offenders on view and cause them to be brought before proper magistrates for trial or examination."

Then to suppress disorder and keep the peace the mayor may arrest offenders on view and take them before proper magistrates "for trial or examination."

Section 10 of article 2 aforesaid, provides: "He (the mayor) shall perform all such duties as are or may be prescribed by law or by the city ordinances, and shall take care that the laws and ordinances are faithfully executed." It will be observed that this section provides, 1st. He (the mayor) shall perform all duties as are or may be prescribed by law or by the city ordinances; 2d, and shall take care that the laws and ordinances are faithfully executed. Among the duties prescribed by law may be placed the duty to preside at all meetings of the city council; to annually and from time to time give the counsel information relative to the affairs of the city, etc., to approve or disapprove all ordinances passed by the city council, and sign such as he approves and state his objections in writing to such as he disapproves. And (3rd) "he shall take care that the laws and ordinances are faithfully executed." Waiving for the present the question whether the laws referred to are state law or city laws, it becomes important and necessary to inquire as to what is comprehended in its broadest legal sense in the phrase, "take

care that the laws and ordinances are faithfully executed." Section 3, of article 3, of the constitution of the United States, provides, among other things "he (the president) shall take care that the laws be faithfully executed." Section 7, of article 3, of the Illinois constitution of 1818, provides, among other things, that the "governor" "shall take care that the laws be faithfully executed." The same provision is contained in the constitutions of 1848 and 1870, and we assume it will be found in all organic acts. Yet we have been unable to find any judicial elucidation of the phrase. If we attempt to analyze the phrase, we find that the word, "take," according to Webster, means in a general sense, to get hold or gain possession of, either passively or by active exertion. The word "care" means "to be anxious or solicitous: to be concerned about; (2) to be inclined or disposed; to have regard to." The words, "to take care," mean, according to Webster, "to be careful," "to be solicitous for." (3) "To be cautious or vigilant." "Faithfully executed," we think, means, that the laws and ordinances should be fairly and honestly carried into effect. The legal import of the phrase as we comprehend it, is that the mayor shall be solicitous and vigilant to carry into effect the laws and ordinances, or shall be careful and vigilant to carry into effect, etc.

Section 14, of said article 2, provides: "In case the mayor or any other municipal officer shall, at any time, be guilty of a palpable omission of duty, or shall wilfully and corruptly be guilty of oppression,, malconduct or misfeasance in the discharge of the duties of his office, he shall be liable to indictment in any court of competent jurisdiction," etc. Obviously, said article 2 forms a complete code, civil and criminal so far as the mayor is concerned. Thereby, the office of mayor is created, his qualifications are fixed, provisions made for filling vacancies—and for a mayor *pro tem*. His duties and powers are definitely prescribed, and for palpable omission of duty, or misconduct in office, criminal procedure and penalties provided.

Hence, we are driven to the conclusion that section 10 of article 2, has not reference to the general laws of the state,

civil or criminal, but has reference only to the laws or provisions of law found within the various articles composing the charter of the municipality, or in other words, the act entitled, "An act to provide for the incorporation of cities and villages," which is a law by virtue of which the city of La Salle was organized. That law created the office of mayor and prescribed his general duties and powers. Such duties and powers are required and conferred by law, and are the laws referred to by said section 10 of article 2. This is manifest, when we consider the object and purpose of the law heretofore referred to providing for the incorporation of cities, etc., and it is still more manifest when we consider the sections of article 3, preceding section 10, wherein are defined the qualifications, duties and powers of mayors followed by section 10, "he shall perform all such duties as are or may be prescribed by law or by the city ordinances, and shall take care that the laws and ordinances are faithfully executed. If we have concluded correctly, it follows that this indictment cannot be maintained under section 14 of article 2 aforesaid, because the breach of duty charged is in permitting a tippling house to keep open on Sunday. No such provision can be found in the city incorporation act; no city, law or ordinance is referred to in the indictment.

We have considered the alleged duty, which was to "take care that the laws of the state of Illinois in the said city of La Salle were faithfully executed." We have noticed the alleged violation of law, namely, that certain persons named were keepers of tippling houses in the city of La Salle, and kept open on Sunday; "that said Frederick W. Mathiessen unlawfully, willfully, knowingly and contemptuously permitted said * * * to keep open their or his tippling house on Sunday." The indictment describes no offense within the purview of section 14, of article 2. The palpable omission of duty therein referred to has reference to some duty imposed by the act of incorporation or the city ordinances, or to some duty definitely prescribed by the laws of the state of Illinois.

"By what procedure shall the mayor take care that the

laws of the state of Illinois against keeping open a tippling house on Sunday are faithfully executed in the city of La Salle? It will not be contended that it is his duty to personally visit the saloons on Sunday and with a strong hand close and bar the doors. If the law is violated any citizen is authorized to make complaint before a proper magistrate and have the offender tried, or make complaint to a grand jury where an investigation can be had and the offender indicted, and, on conviction, fined not exceeding \$200 for each offense. A prosecution of the offender in the manner indicated is the only way provided by law for dealing with the offender. Any person may start the machinery of the law, and the law has designated an officer called the state's attorney, and enjoined upon him the imperative duty of prosecuting indicted offenders, and, I am prepared to say of the present state's attorney that he is willing and able to discharge his duty, and that he has heretofore and quite recently been diligent in that regard. The law has not specially imposed upon the mayor as an official the duty to personally detect offenders and enter complaint before a magistrate or grand jury. The public, of course, expect that his influence as a private citizen, and in his official capacity will be exerted in favor of law and order.

There is no intimation that the defendant in any manner, interfered, or attempted to interfere to protect offenders from prosecutions. There is no intimation that he in any manner aided, abetted or encouraged the proprietors of tippling houses to keep open on Sunday. True, it is alleged substantially that the defendant, regardless of his duty as mayor, "unlawfully, knowingly, willfully and contemptuously permitted the said * * * to keep open his tippling house on Sunday." A mayor has not power or authority to grant a permit or a privilege or a license to keep open a tippling house on Sunday. Therefore, the allegation that he permitted, etc., can not be accepted in the sense that he issued a permit, or license or privilege, etc. The construction must be most strongly against the pleader. The allegation can be accepted for no more in a legal sense than that he suffered * * * to keep open his tippling house on Sunday, or

that * * * kept open his tippling house on Sunday, and the mayor did not interfere to prevent, therefore, he was guilty of a palpable omission of duty. Suppose on trial on the indictment proof was made that Frederick W. Mathiessen was mayor of the city of La Salle; that A. B. kept a tippling house in the city of La Salle; that he kept his tippling house open on Sunday and that the mayor knew he so kept open, would such proof convict the mayor of a palpable omission of duty? We think not. The mayor, nor any other citizen, could commence any proceeding against the keeper of a tippling house under the law in question until the overt act of keeping open was committed, thereafter the offender could be prosecuted. Ordinarily, legal proceedings can not be instituted against a man to prevent him from committing a crime. No duty required of the mayor by the city ordinances is involved in this indictment. The mayor is not required by any law or ordinance to adopt precautionary measures to guard against the possibility or probability of a tippling house keeper keeping open on Sunday. The writer appreciates the gravity of the offense this indictment seeks to abate, but the defendant is not indicted for the crime of keeping open a tippling house on Sunday. He is indicted for a palpable omission of duty as mayor, in that he did not prevent other persons from keeping open a tippling house on Sunday. There is no matter of fact alleged or set forth in the indictment from which a palpable omission of official duty by the mayor can be evolved. The fault lies, not with the state's attorney, but in the insufficiency of the facts as they exist.

Section 260 of the criminal code (Starr & Curtis) was referred to in the argument. That section provides: "Every person holding any public office (whether state, county or municipal), trust or employment who shall be guilty of any palpable omission of duty * * * or who shall be guilty of willful and corrupt oppression, malfeasance or partiality, where no special provision shall have been made for the punishment thereof, shall be fined not exceeding \$10,000 and may be removed from his office, trust or employment." This section imposes no duties on mayors or other municipal officers.

Then we must look elsewhere for a law prescribing his duties and they will be found in the "Act of Incorporation," which we have considered.

The motion to quash will be sustained.

NOTE.

The above decision was cited in the briefs of counsel in *People ex rel v. Busse, Mayor, etc.*, now pending in the appellate court of Illinois, first district.—Ed.

(Circuit Court of Champaign County. In Chancery.)

Samuel H. Meloy

vs.

The Wabash Railway Company, et al.

(March, 1879.)

1. **RECEIVERS—APPOINTMENT OF FOR RAILROAD COMPANY AT INSTANCE OF BONDHOLDERS.** The court will not appoint a receiver of a large railroad system at the suit of a bondholder where there is no allegation of fraud or insolvency, and it is merely alleged that the railroad company has failed and refused to apply its revenues to the payment of interest on its bonds.
2. **SAME—WHEN COURT SHOULD APPOINT.** In the appointment of a receiver the court always exercises its extraordinary powers. The remedy is harsh and summary in the extreme and should not be applied except in cases of extreme necessity. No ordinary occasion should justify its use.
3. **SAME—NOT APPOINTED UNLESS FRAUD SHOWN OR IMMINENT DANGER TO PROPERTY WOULD ENSUE.** A receiver is not usually appointed unless fraud is clearly shown or imminent danger would ensue if a receiver is not appointed. There must be an imperative necessity for the step.
4. **SAME—IN CASE OF RAILROAD CORPORATION.** Courts are more reluctant to lend their extraordinary aid by the appointment of receivers over railways than in any other class of cases.
5. **REMEDIES OF BONDHOLDERS UPON FAILURE OF MORTGAGOR TO PAY INTEREST.** If the mortgagor in a railway mortgage securing an issue of bonds fails to pay the interest on the same, the remedy of the bondholders is to foreclose the mortgage or to sue

in a court of law, and not to apply for the appointment of a receiver.

6. **APPOINTMENT OF RECEIVERS—WHAT CONSIDERATIONS SHOULD INFLUENCE COURT.** In an application for the appointment of a receiver of a railroad at the suit of a bondholder, the fact that such appointment would affect the market value of the bonds and seriously affect the operation of the road should be taken into consideration by the court.

Bill for foreclosure of a mortgage and the appointment of a receiver. Heard before Judge C. B. Smith. Decided March, 1879. The facts are stated in the opinion.

Hassler & McWilliams, for complainant.

Gen. Wager Swayne of Toledo, Ohio, & *H. S. Green*, for defendants.

SMITH, J.:—

This suit is brought by the complainant, a resident of the District of Columbia, to enforce the payment to him of bonds amounting to the sum of ten thousand dollars, which he avers it is the duty of the Wabash railway Company to pay, and it further avers that the Wabash Railway Company, has not nor any one for it, paid the Company's bonds nor any interest thereon, since November 1, 1874, and that said Company is now denying its liability for either principal or interest upon said bonds owned by complainant. And the bill sets out with great care and elaboration the organization and history of the various railroad corporations which ultimately terminated in one consolidated, continuous line of road extending across three states, from the city of Toledo, in Ohio, to the Mississippi river in Illinois, making in all over six hundred miles of continuous railway, and now known as the "Wabash Railway Company;" and it is alleged in the bill, and admitted by defendants, that in 1862 the Toledo and Wabash Railroad Company, for the purpose of enabling it to meet the demands made upon it for transportation, issued six hundred thousand dollars of bonds, known as "Equipment Bonds," and placed them upon the market without any security beyond the maker's promise to pay thereon. These bonds

are made payable in 1883, with seven per cent. interest, payable semi annually.

It is averred that in February, 1867, the Toledo, Wabash and Western Railway Company resolved to, and did issue its bonds to the extent of fifteen millions of dollars, to be known as its consolidated bonds, and at the same time made and recorded a mortgage on all its property securing the payment of these new bonds when they should be issued. The object of this action on the part of the company seems to have been to take up the various outstanding obligations against the small section of road composing the new consolidated company and fund them and issue new bonds, to take their place as fast as the owners of the old bonds would come forward and surrender them. The right to fund the old bonds, of course, was optional with the holders. It appears, from one of the exhibits shown by the defendant, that 96.5 of all the outstanding indebtedness has been funded under this scheme. The exhibit shows that none of these equipment bonds have been funded, and it is averred in the bill that the holders of the equipment bonds have not been invited to fund their bonds and thus share the benefit of the consolidated mortgage bonds. It is alleged that the present corporation, the Wabash Railway Company, came into possession of all the property rights and franchises of the Toledo, Wabash and Western Railway Company, by purchase at a judicial sale, and that it holds the property subject to the rights of the consolidated bond-holders, and of those who hold the equipment bonds. The respondents deny that they hold the property subject to any supposed rights of the owners of the equipment bonds, among whom is the complainant in this suit. The complainant charges that the defendant is neglecting and refusing to apply all its net revenues to the payment of the interest accruing on the bonds secured by the consolidated mortgage and especially to that class of bonds known as the equipment bonds, and charges that the defendant is applying a part of its resources to the payment of the Seney mortgage, which it alleges to be junior to the complainant's bonds. The bill prays for an account and that the bonds held by complainant

may be declared a lien on the property of the defendant, and the defendant required to pay the same; that the said mortgage be foreclosed, and that pending proceedings for foreclosure, a receiver for the property of the defendant be appointed.

The respondent denies that the complainant's bonds are secured by the consolidated mortgage, and denies any liability to him whatever, and resists the appointment of a receiver, and the propriety of granting or refusing the prayer of this bill is the only question upon which I am now called to pass, and in doing so I shall assume for the purpose of this motion, that the complainant's bonds are secured by the consolidated mortgage, and that the Wabash Railway Company holds and owns its roads and franchises subject to the superior lien of the complainant, as he claims in his bill. In other words, upon his own showing, is he entitled to the appointment of a receiver? In the appointment of a receiver the court always exercises its extraordinary powers. The remedy is harsh and summary in the extreme. The court before ascertaining the right or to whom the property in controversy belongs, upon substantially ex parte proceedings (for they can be but little better when even both parties are before the court) lays a strong hand upon him who is in possession of the property and compels him to surrender it to the possession of a stranger and engage in long and vexatious litigation for its recovery. This sword of justice with which courts are armed, ought to be sheathed except in cases of extreme necessity. No ordinary occasion should justify its use. In *Baker v. The Administrator of Backus*, 32 Ill. 79, 115, the supreme court say that: "A receiver is not usually appointed unless fraud is clearly proved by affidavit, or when it is shown that imminent danger would ensue, if the property is not taken under the care of the court, before an answer is put in. There must be a strong special ground to induce the court to interfere in this way before an answer."

And in *First National Bank of Sioux City v. Gage*, 79 Ill. 207, 209, the court say that: "A receiver should be appointed in no case, unless it is made to appear there is an imperative

necessity for the step, to preserve some particular property for such parties as shall be entitled to the benefit."

In *High on Receivers*, at section 365, it is said that: "While the jurisdiction of equity over railway corporations, as enlarged by the statutes and practice of the various states, is based upon and exercised in accordance with substantially the same principles which govern its jurisdiction over other corporations, the courts are more reluctant to lend their extraordinary aid by the appointment of receivers over railways than over other corporate bodies. The importance of these corporations, as being *quasi* public bodies, and the peculiar nature of their property and franchises, sufficiently explain the reluctance with which equity interferes with their management, and in general the courts proceed with extreme caution in placing them in the hands of receivers and whenever the ordinary remedies provided by law are open to the creditors of such corporations for the enforcement of their demands, the appointment and continuance of a receiver in office for a long period of years is the exercise of a judicial power which can only be justified by the pressure of an absolute necessity."

These are sound and wholesome doctrines of the law, and are but examples of the language of all the books, and it seems to me to be a matter of regret that the courts have not been always as careful, and more especially in recent times, to keep within the prescribed limits of this extraordinary jurisdiction as would seem to have been required by private and public rights. It is a matter of public notoriety that millions of dollars of property have been wasted and squandered in the state of Illinois alone, and men delayed and hindered in the assertion of the plainest rights, by the free use of this arbitrary and monstrous power. The great railway interests of this state have been seriously crippled by having their earnings eaten up and squandered by being run by receivers and courts instead of by the owners. Railroads, like individuals, should be compelled by law, if need be, to keep strictly and faithfully all their legal obligations both to private individuals and to the public. Railroad corporations, like individ-

uals, must render a willing obedience to the majesty of the law and submit to its mandates, and like individuals they may appeal to the laws for protection when their just rights are invaded. But if this corporation for any reason, good or bad, fails to meet its legal obligations and to pay all its debts promptly, why should it have all its property taken away from it before judgment and turned over to the hands of a stranger? If it shall be sufficient cause for the appointment of a receiver that it cannot pay its debts, then by the same reasoning might the holders of mortgages and trust deeds ask to have the farms and houses in Illinois turned over to them until they are paid.

The complainant argues here with a great deal of force and justice, that the majority have no right to deprive the minority of their right of collecting their debt, however small that debt may be compared with the vast volume of the property of this corporation. While this is true, the majority have a right to say to him when he comes into a court of equity for relief, that he shall not be permitted to pursue a course that would involve common ruin to all and waste infinitely more than he can save. If this complainant has any valid and subsisting claim against any of these defendants, either of a legal or equitable character, that claim can be asserted by the ordinary and usual mode of collecting debts.

If these bonds are secured by this mortgage, I can perceive no reason why the mortgage cannot be foreclosed in the usual manner, and if the defendants fail to pay what is found due against them, the court will order their property sold and compel them to pay. If the demand is simply a legal one, then a judgment at law can be had and they may take on execution, if the defendant has any property. But what is the court here asked to do? It is conceded on the argument that the value of the property and franchises of these defendants amounts to more than twenty millions of dollars; that it is a great public highway traversing and crossing three states of this union, giving constant employment to a great multitude of people and carrying a vast commerce and thousands of people securely and safely on its flying trains

every day and night. It is in proof that under its present wise and prudent management its securities and obligations are steadily rising in value year after year and no effort is made to show that this steady increase in its value is the result of stock-jobbing or gambling. And yet the court is asked to reach out and lay its hands on this vast enterprise and practically paralyze and put a stop to all that has been realized within the past two or three years and turn the management over to stranger hands, who could at best but imperfectly operate it, and all for the purpose of enabling the complainant to collect his debt of ten thousand dollars by this extraordinary method. The language of the supreme court of the United States in the case of *Railroad Company v. Soutter*, 2 Wall. 510, 523, is so pertinent here that I cannot do any better than to quote it: "The idea of appointing or continuing a receiver for the purpose of taking ninety-five miles of railroad from its lawful owners, which is earning a gross revenue of \$800,000 per annum to enforce the payment of a judgment of \$16,000, the lien of which is seriously controverted, is so repugnant to all our ideas of judicial proceedings that we cannot argue the question. If Mr. Howard has a valid judgment, the usual modes of enforcing that judgment are open to him, both at law and in chancery; but the extraordinary proceeding of taking millions of dollars' worth of property—of such peculiar character as railroad property—from its rightful possessors as one of the usual means of collecting such a comparatively small debt, can find no countenance in this court."

Such is the language of the highest court in the country, when an effort was made to take from the rightful owner only ninety-five miles of railroad to compel them to pay a judgment of \$16,000. But here I am asked to take from this defendant a railroad over six hundred miles long, worth at least twenty millions of dollars and put it into the hands of a stranger to enable the complainant to collect ten thousand dollars of bonds and that upon a controverted claim, and that too upon a bill where no single allegation of fraud appears and where it does affirmatively appear that this defendant

has a lawful and just existence through a regular judicial proceeding and for which its present owners paid a very large sum of money. I am asked here to go to the very extreme of judicial power and to pass far beyond the ordinary boundaries which have hitherto circumscribed judicial discretion. The consequences of such judicial madness to the thousands of people who own the bonds of this great corporation would be most deplorable. Who can doubt, if a receiver for this company was appointed here this morning, that its bonds would not be depreciated ten per cent. in Wall street before sundown, thereby causing vastly more injury and loss to the holders of the company's obligations than would be saved to this complainant? Who can doubt, if I appointed a receiver that the running arrangements of the road must be seriously impaired and interrupted to the great detriment of public and private interests? These are considerations to which the court cannot be blind and must not disregard in the exercise of that sound judicial discretion which ought to control the deliberations of the court.

In arriving at this conclusion, I do not deny the complainant the full and complete right which he enjoys to proceed with his bill in the ordinary and usual mode provided by the law for every citizen to enforce payment of his just debts against his debtors, but on the contrary, to prevent the gravest and most serious consequences to a multitude of people who are interested in saving this great railway company and its property from becoming again the helpless victim of railroad wreckers.

The appointment of a receiver and the prayer for the injunction will be denied. Solicitors for respondents may prepare an order to be signed to that effect.

(Superior Court of Chicago. In Chancery.)

Thos. Clowry, Adm'r, etc.

vs.

Unknown Heirs of Patrick Brennan, Margaret Brennan, etc.

(November, 1869.)

1. **DEED—CONSTRUCTION OF—INTENT OF GRANTOR CARRIED OUT.** Under a deed to A. of "one-half * * * of the premises and * * * such * * * further interest, if any, in the remaining half of said premises as she * * * as widow * * * would be entitled to under the law of Illinois if her husband had died seized of an unincumbered title in fee simple to said premises," there being no issue of A. and her husband, A. is entitled to dower in "the remaining one-half," and not to one-half of the one-half in fee simple and dower in the remaining one-quarter, as the intent of the grantor was that her interest in the remaining one-half should be the same as if her husband had died seized in fee simple of the *entire premises*.
2. **CHARITABLE USE—WHAT IS.** A bequest of an estate to an executor to give to such charitable and religious purposes as he shall see fit, is a bequest for a charitable use within the meaning of the Statute of Elizabeth, and valid.
3. **CHARITABLE USE—DEATH OF TRUSTEE—WHEN COURT WILL NOT SUPERVISE.** Where an estate is left to an executor for such charitable purposes as he may deem fit; should the executor die without exercising his discretion, the court will not undertake the supervision of the trust, but will allow the estate to go to the heirs of the donor.

Petition for partition. Heard before Judge Jameson. The facts are stated in the opinion.

Thos. Clowry, pro se.

Sleeper, Whiton & Durham, for defendants.

JAMESON, J.: —

On the first of June, 1863, Patrick Brennan, who was seized of lot 5, in block 3, in Brainard & Evans' addition to Chicago, together with his wife, Margaret, conveyed the same to one Martin Brennan as trustee, in trust to secure certain sums at a certain time therein mentioned, payable to another Patrick Brennan, whom I shall designate as Patrick Brennan

2d. Brennan 1st died Nov. 14, 1865, intestate, leaving Margaret, his widow, but no children or descendants of children surviving. Margaret was afterwards duly appointed the administratrix of his estate, on the 19th of July, 1866. In the mean time, on the 4th of January, 1866, Martin Brennan, the trustee, advertised for non-payment of the amount due, and sold the lot in question, under the power in the trust deed, Patrick Brennan 2d, the creditor, being the purchaser. On the 13th of September of the same year, Patrick Brennan 2d, in consideration of \$5.00, conveyed to Margaret Brennan, widow, and to the unknown heirs of Patrick Brennan, deceased, the lot in question, except the west twenty feet thereof. The quantity of the estate thus conveyed to the several parties was described in the deed as follows: "To the said Margaret Brennan one-half, undivided, of the premises above described, absolutely and in fee simple, and moreover, such other and further interest, if any, in the remaining half of said premises, as she, the said Margaret Brennan, as widow of the said Patrick Brennan, deceased, would be entitled to, under the law of Illinois, if her husband had died seized of an unencumbered title, in fee simple, to the said premises; and the residue of the said remaining half of the said premises shall be had and held in fee simple by the said unknown heirs of the said Patrick Brennan, deceased."

In June, 1867, Margaret Brennan, the widow, died, leaving a will, which was duly proved, and in which she named the late Dr. Dennis Dunne, her executor. By this will, she directed the said Dunne to sell her real estate, and that the proceeds thereof, after the payment of her debts, be divided as follows: "The sum of \$500 to Patrick Donohoe, of Greensburgh, in the state of Pennsylvania, and all the rest and residue of the proceeds of said real estate, be given by her executor to such charitable and religious purposes as he might deem fit."

Letters testamentary were issued to Dennis Dunne, on the 19th of June, 1867, but he died in December, 1868, and the petitioner, Thomas Clowry, was appointed administrator *de bonis non*, with the will annexed. Dennis Dunne also left a

will in which he appointed Edward Dunne and John Coughlan, his executors; the latter of whom qualified, and is made a defendant in this case. This petition was filed by the administrator *de bonis non*, Clowry, for a partition of this lot, to enable him to carry out the provisions of the will of Margaret Brennan, under the directions of this court.

The first question is, to determine the respective shares of Margaret Brennan and of the heirs of her husband, Patrick Brennan, deceased, under the conveyance from Patrick Brennan 2d. There then remains a second question: What directions shall be given by this court, respecting the bequest to charitable uses, made by Margaret Brennan, under the circumstances of the case?

The real nature of the conveyance by Patrick Brennan 2d, is admitted to have been this: he desired only to be paid his debt, and finding that the west twenty feet of the lot would do that, he wished, like an honest man, to give the residue of it back to those who would have had it on the death of Patrick Brennan 1st, and it is probable that he desired them to take in the same proportions as if Patrick Brennan had died seized of that alone. The phraseology of the deed has already been given. It was contended by the petitioner, before the master, upon whose report this case comes up, that the true construction of this language was that the widow should have one-half of the residue of the lot after reserving the twenty feet, absolutely, and that the other half should be apportioned between her and the heirs of her husband as it would have been had her husband died seized of that half only; in which case, she would have, first, one-half in her own right, by virtue of the conveyance to her by Patrick Brennan 2d, and then, one-half of the remaining half, that is, one-quarter of the premises, under the 46th section of the statute of wills as heir to her husband, and beside this, would have her dower in the remaining quarter; making, in all, a fee in three-fourths of the premises, and dower in the other fourth. This, in my judgment, in which I agree with the master in his report, is not the true construction of the deed. It will be observed that the words, "said premises" are used in every clause of this

conveyance; and I think, wherever used, they refer to the same lot or part of a lot, namely, that conveyed by Patrick Brennan 2d to Margaret Brennan, and the next of kin of her husband. Thus, the widow was to take one-half of *said premises* in fee simple, and moreover such other and further interest, if any, in the remaining half, * * * as the said Margaret * * * as widow of the said Patrick Brennan, deceased, would be entitled to, under the law of Illinois, if her husband had died seized of an unencumbered title, in fee simple, to "*the said premises*," not to the remaining half of said premises.

Now, had her husband died seized of a fee in the *said premises*, under the conditions stated, his widow would clearly have been entitled to one-half of the whole in fee, and to dower in the other half, under the 46th section of the statute of wills. Such, therefore, must have been the decree of the court, had she applied for a partition during her life time. As she died without making such an application, her right of dower has fallen in, and hence her heirs are entitled to only one-half of the lot, subject to the terms of the will.

The second question presents more difficulty. This bequest of money to the executor of Margaret Brennan, to be disposed of for "such charitable or religious purposes as he might think fit," seems to have left a discretion in the executor, as to both the objects and the recipients of the bounty. Dunne died, having done nothing whatever towards executing his trust, except to qualify as executor, and, it is said, to collect and use for his own purposes the personal estate of his testatrix.

There is, I think, no doubt that this is a bequest for charitable uses, within the meaning of the statute of Elizabeth, chapter 43, section 4, determining the description of trusts of that nature which the law will countenance and enforce. The uses prescribed by Margaret Brennan's will are thus stated, "and all the rest and residue of the proceeds of said real estate, is to be given by my executor to such charitable and religious purposes, as he may deem fit."

The uses which are countenanced by the statute of Elizabeth, and which courts of equity are authorized by it to en-

force as charities, are as follows: "Devises for the relief of aged, impotent and poor people; for the maintenance of sick and maimed soldiers and mariners; for schools of learning, free schools, and scholars at the universities; for repairs of bridges, ports, havens, causeways, *churches*, seabanks and highways; for education and preferment of orphans, the maintenance of houses of correction, for the marriage of poor maids," *et cetera*.

The word *charitable* in the bequest of Margaret Brennan, must be construed to refer, generally, to any of the uses which are defined in this statute, and to none others; and the word *religious*, as relating especially to one of the uses therein enumerated, namely, *repairs of churches*, the word "repairs," doubtless, to receive a liberal construction. So far, then, as the nature of the charities contemplated by the will is concerned, the bequest is not void as contravening that statute.

Now, will this court award to the administrator of Margaret Brennan *de bonis non*, a discretion to execute the will in the distribution of this bequest, as he may deem fit? Such a course is sanctioned by none of the authorities, and it is doubtful if such an order was ever made by a court of equity. If the court will not direct the administrator *de bonis non* to execute this trust, will it itself attempt it? Will it, in other words, provide a scheme of charities to which this bequest shall be applied, instituting inquiries as to the probable direction the deceased executor would have given to the charity, had he lived; or if, despairing of ascertaining precisely the intention of either the donor, or her executor, coming as near to it as may be, thus, as it is called in equity, executing this trust, *cy pres*?

This is one of the most difficult questions in equity jurisprudence. There is no doubt, in general, of the jurisdiction of a court of chancery to enforce trusts for charitable uses. The power was either given, or recognized as existing already, in that court, by the statute 43 Elizabeth, chapter 4 referred to, which is in force in this state. The better opinion seems to be, that courts of equity always had that power, even before and independently of that statute. See 2 Story, Eq. Jur.

sections 1142-1162; 2 Redf. on Wills, 776 and following pages.

A court will not hesitate to interfere and compel the execution of such a trust, whenever it is clearly expressed in the will; where the trustee is named, or is easily ascertainable; or where the objects of the testator's bounty are pointed out; but whether, where the persons beneficially interested in the charity are not described, perhaps not even known to the testator, but a discretion to name them, and to determine the proportions in which they shall receive it, has been left to the executor; and, especially, where the executor, as here, has died, without having taken any steps towards executing the trust, the court will then step in to execute it, is a far different question, upon which our American courts have not been agreed.

In England, the Lord Chancellor has always had extensive authority in cases of this kind. But in what character has he been understood to act? Has he, in assuming to exercise that authority, acted in his ordinary capacity as chancellor, or as commissioner of the king, who, as *parens patriae*, undoubtedly has the power, as a branch of his prerogative, to intervene and name the objects of a charity, in danger of lapsing for want of a trustee, or because of the vagueness of the trust. 4 Kent. Com. 508 and note; 2 Redf. on Wills, 828; *Mogridge v. Thackwell*, 7 Vesey, Jr., 36. In either of these cases, it would be equally the Lord Chancellor who would intervene; in the one case, however, in the exercise of his ordinary chancery jurisdiction over trusts, and, in the other, as the agent through whom the king exercises his extraordinary prerogative. In this country the question has been variously decided, according to the views entertained of the nature of the power. Thus, in *Saltonstall v. Saunders*, 11 Allen (Mass.) 446, the supreme court of Massachusetts assert a jurisdiction over charities almost co-extensive with that of the chancellor of England. On the other hand in New York, in *Williams v. Williams*, 4 Selden, 525, 548, it was held, that the courts of equity of that state could only administer such charities as create a trust within the strictly equitable cognizance of such

courts. In deciding this case Judge Denio said: "In that class of cases, therefore, where the gift is so indefinite that it cannot be executed by the court, * * * the claim of the representatives of the donor must prevail over the charity. The reason is, that we have no magistrate clothed with the prerogatives of the crown, and our courts of justice are entrusted only with judicial authority. Where the gift is capable of being executed by a judicial decree, I know of no reason why the court should refuse to execute it." He then adds: "My own opinion is, that the distribution of powers among the great departments of the government which is a fundamental doctrine in the American system, would prohibit the courts from exercising a jurisdiction so purely discretionary." From this I infer, that in the opinion of Judge Denio, the power in question was a branch of the royal prerogative, not a judicial power, and that consequently it was not inherited by courts of chancery in this country on its separation from Great Britain. The cases on this interesting point are collected and discussed in 2 Story, Eq. Jur., section 1167-1183; 2 Redf. on Wills, 776 and following pages.

Our supreme court have not passed, so far as I am aware, upon precisely this question. In *Heuser v. Harris*, 42 Ill. 425, they indicate, perhaps, the principles upon which they would decide it, were a case to come before them, of which the facts were such as to require an adjudication of it. Judge Breese, in deciding the case, says: "It is well settled in the English chancery courts, that where money is given to charity generally and indefinitely, without trustees or objects selected, the king, as trustee or *parens patriae*, will direct a scheme, and where trustees are appointed, the chancellor will direct a scheme for the charity, he having jurisdiction over the trust (Boyle on Charities, 238, 239); and this, when neither trustee nor objects are selected." He adds: "Surely the powers of a court of chancery should extend so far as to supply a trustee to manage a testamentary bequest; and, if it be admitted one could not be elected under this will, a court of chancery to carry out the intention of the testator would, by a liberal intendment, appoint one. Every reasonable act will be done,

and the most liberal construction of the will had, by a court of chancery, to aid the beneficiaries, when the intention is plain and undeniable. *Hadley v. Hopkins' Academy*, 14 Pick. 240. But without reference to 43 Elizabeth, we think that the innate, inherent jurisdiction of a court of chancery is fully competent to supply defects of this nature.

But, it should be observed, it was not necessary to the decision of that case, that the court should consider this question, because there the object of the bequest was certain, as was also the intended recipient of it. The court say: "The object of this bequest is certain, and so is the recipient, being the school district in which the farm is situated" etc. The only question was whether the school district, of which the boundaries had been changed since the date of the devise, could take the benefit of it.

On the whole, admitting that the authorities would warrant the intervention of this court to provide a scheme of charities to carry into effect this will, I have great doubt whether, under the circumstances, it ought to be done. In the first place, the amount left after the payment of the debts of the testatrix, and of the specific legacy of \$500, will be but small. Secondly, there is no person or corporation before us claiming the benefit of this bequest; nor is it suggested that any such claimant exists. I doubt if it is my duty to advertise for beneficiaries under the trust, or to presume that it would be thought worth the expense, by any charitable or religious institution, to seek the distribution of this fund in its favor. Finally, the executor having died without naming the donees of the charity, admitting that a mere personal discretion to be exercised by the executor was not intended, and that the bequest has not therefore elapsed, the difficulty seems too formidable of attempting to make a distribution of the fund in accordance with the terms of the will.

A decree for the partition of the lot between the parties according to their respective interests, as stated, will therefore be entered, but the court declines to direct the execution of the will so far as relates to the charity.

(Circuit Court of Cook County.)

Christian Neilson

vs.

**The City of Chicago, the Chicago, Rock Island & Pacific
Railway Company and the Lake Shore & Michigan
Southern Railway Company.**

(July 27, 1899.)

1. **CONSTITUTIONAL LAW—POLICE POWER—COMPENSATION FOR PROPERTY DAMAGED FOR PUBLIC USE.** Where private property is damaged through the elevation of railroad tracks, elevated in accordance with a city ordinance, such damage must be compensated for under the constitutional provision that private property shall not be damaged for public use without compensation and it is no defense that the ordinance was passed under the police power.
2. **CONSTITUTIONAL LAW—PROPERTY DAMAGED FOR PUBLIC USE—POWER OF LEGISLATURE TO EXEMPT MUNICIPALITY.** The legislature cannot exempt a municipality from the operation of the constitutional inhibition against taking private property for a public use without compensation.
3. **CONSTITUTIONAL LAW—RAILROADS—PROPERTY DAMAGED FOR PUBLIC USE—EFFECT OF AUTHORITY OF MUNICIPALITY UNDER POLICE POWER.** A railroad must compensate for property damaged by it in pursuance of a public use even though the improvements causing the damage have been ordered by the city acting in its governmental capacity in the exercise of its police power.
4. **PLEADING—DUPLICITY—WHAT IS NOT.** Where one general public improvement is carried on by several distinct entities, a declaration is not double which alleges that one of them inflicted certain damage and another certain other damage, etc., as long as they are not alleged as separate and distinct causes of action but simply as allegations as to injuries inflicted in the performance of the entire work, from all of which taken together the plaintiff's property was damaged.
5. **PARTIES—JOINDER OF CORPORATION AND AGENTS IN ACTIONS EX DELICTO.** In actions *ex delicto* a corporation and its agents are alike responsible and may be sued severally and jointly.
6. **ACTIONS—TRESPASS AGAINST MUNICIPAL CORPORATIONS.** The action of trespass as well as case will lie against a municipal corporation.
7. **MUNICIPAL CORPORATIONS—LIABILITY WHEN NOT ACTING IN STRICTLY GOVERNMENTAL CAPACITY.** When two parties enter into

an agreement by which certain work is to be done in pursuance of a joint purpose and the property of a third person is injured thereby the first two parties are jointly and severally responsible therefor and it is immaterial that one of the contracting parties is a municipal corporation.

8. CONSTITUTIONAL LAW—DAMAGING PROPERTY FOR PUBLIC USE—WHAT SORT OF DAMAGE RECOVERABLE. Where property is damaged for a public use it is only special damage to plaintiff's property which can be recovered, and not the damage resultant from the contiguity of properties.
9. CONTRACTS—PROPERTY DAMAGED FOR PUBLIC USE—EFFECT OF AGREEMENT TO SAVE HARMLESS. An agreement to save a party harmless from any liability incurred by him in the prosecution of a public work, irrespective of its validity between the parties, cannot effect a plaintiff's rights against either of the contracting parties.

Demurrer to declaration. Heard before Judge Murray F. Tuley. The facts are stated in the opinion.

Masterson & Hoft, for plaintiff.

C. S. Thorton, for the defendant, the city of Chicago, and
R. Mather, for defendant, C., R. I. & P. R. R. Co.

Gardner & McFadden, for defendant L. S. & M. S. R. Co.

TULEY, J.:—

The demurrer of the city raises the question as to the liability of the city of Chicago, of the Chicago, Rock Island & Pacific Railway Company and the Lake Shore & Michigan Southern Railway Company, in connection with the elevation of the tracks of the two railroad defendants made under an ordinance of the city of Chicago of July 9, 1894.

The tracks of the two railroad companies were raised over a distance of several miles in the thickly populated part of the city, many of the street crossings on the line of the elevation were cut down and the grade lowered at the point of intersection; streets and alleys were built up solidly at some intersecting points, leaving them but blind thoroughfares; sidewalks on approaches to the point of intersection of the crossing streets were lowered, light and air of adjacent buildings were more or less interfered with and the buildings were cracked or otherwise damaged through the making of the im-

provement. A large number of suits have been commenced against the city of Chicago and the two railroad companies for the damages sustained by reason of the work.

In the amended declaration in this case it is alleged that the plaintiff was the owner of a large brick building adjacent to the right of way of the two railroad defendants, and located on the northwest corner of the intersection of Armour avenue and Thirty-seventh street. That on or about the 9th of July, 1894, the defendant, the city of Chicago, passed an ordinance whereby it required and contracted with the railroads that they should elevate the plane of their railroad tracks in the rear of and on the west side of plaintiff's premises in a certain manner therein described, setting out the ordinance in full. That said ordinance provides for the elevation of the tracks of the railway companies, designates the cross streets, etc., to be viaducted, among others being Thirty-seventh street, and provides for excavating such streets, gives specific details for the doing of the work, and that "all of said work shall be done as by and for the city of Chicago under the superintendence of the Department of Public Works, but at the expense of the said railway companies." Where the tracks of the two railway companies parallel each others, as they do most of the distance, the work was to be done at the joint expense of the railways, and where they did not parallel each railway was to pay the expense of elevating its own tracks. Provides that the damages caused by change of grade of streets and alleys should be adjusted and paid by the city of Chicago and that the ordinance should be null and void unless within thirty days it should be accepted by the railroad companies. That they should by their acceptance agree to pay \$50,000 as liquidated damages for failure to carry out the provisions of the ordinance. Also that the railway companies should agree to pay, and pay at the time of the acceptance, to the city of Chicago \$100,000 as a contribution toward the liabilities for land or business damages incurred or recoverable from the city of Chicago by the passage and enforcement of the ordinance or by changes of grade, etc., and that such payment should be held to protect the railroad com-

panies from all liability for said damages to said city, or others, save that covered by negligence in the doing of the work provided for.

The declaration alleges that said ordinance was accepted by the railroad companies, \$100,000 deposited by them with the city of Chicago in accordance with its terms; that in accordance with the provisions of the ordinance plans and specifications were prepared for the work which required a part of the work to be done upon plaintiff's premises. That the railway companies commenced the elevation of their tracks in August, 1895, and practically completed the same by the end of November the same year. That it was the duty of defendants, before committing or permitting any damages to or taking any of plaintiff's premises, to have assessed and appraised the same and to have paid plaintiff a just compensation therefor; but regardless of such duty they did such work of elevation and of the excavation of Thirty-seventh street, etc., without paying such just compensation. That the defendants also, disregarding their duty to do said work in such manner as not to interfere with the property rights and easements of the plaintiff in any manner, so negligently and carelessly excavated Thirty-seventh street and conducted the work that the supports and foundations of his building were loosened and cracked so as to make the building almost worthless, and constructed a large embankment on the west side of and adjacent to plaintiff's premises. That the city as principal, and the railroad defendants, as agents and servants of the city, constructed a stone wall on the north side of Thirty-seventh street and across their right of way and into plaintiff's premises and up against and adjoining plaintiff's building, and in and upon the close and grounds of plaintiff, and appropriated part of plaintiff's premises to their own use, and, in disregard of plaintiff's rights, built over their right of way into premises not belonging to defendants, and thereby shut out light and destroyed other easements which plaintiff enjoyed upon the west and rear end of said premises. That all of said acts and doings were done in accordance with plans and specifications made by the defendant railway companies, rati-

fied and approved by the city, and were all done "as, by and for the city and under the direction and supervision of the city."

It alleges general ratification by the city; the tearing up and taking away of the sidewalk belonging to said premises and the lowering of the grade of the sidewalk so that it became impossible for the public to enter said premises for business purposes, whereby plaintiff was forced to build a stairway for that purpose down to the sidewalk. Alleges the taking and carrying away of a street lamp, the property of plaintiff. That the plaintiff's premises were otherwise greatly injured and made useless for the purpose intended. That having elevated the tracks of the railroad companies, the two railroad companies built an iron bridge over Thirty-seventh street crossing and continuously since have permitted the running of defendants' railroad trains over the same. Whereby plaintiff has been greatly damaged and his property rendered almost worthless, and the business to which it was adapted rendered almost worthless; all to the damage of plaintiff of fifteen thousand dollars.

The contention of the city upon its demurrer is that the ordinance of 1894, requiring the railway companies to elevate their tracks, construct subways, viaducts, etc., was passed in the exercise of the police power of the city. "That the constitutional provision that private property shall not be taken or damaged for public use without just compensation," must be construed with reference to the police power, and so construing it, that no recovery can be had by plaintiff.

The city claims, "To support the ordinance upon the broad foundation of the right to exercise the police power of the state for the public safety."

I find that the appellate court has passed upon this identical question, in a case not cited upon the argument, of *Marshall v. City of Chicago*, 77 Ill. App. 351. While this decision is not controlling, except in that particular case, *Marshall v. The City*, yet the opinion of Judge Adams is so logical and convincing, and so well sustained by the decisions of our own supreme court, that there is no escaping from its conclu-

sions. The litigation arose out of a claim for damages caused by the doing of the work under this same ordinance of July, 1894.

Judge Adams, in that case, well says: "It stands admitted" (as it is by the demurrer in this case) "that the plaintiff's property was damaged for public use, and to hold that in such case there can be no recovery would be to nullify the constitutional provision cited." And that, "No case has been cited, nor do we believe any can be found in which, there being a provision (constitutional or statutory) for compensation for damage occasioned to private property for public use, it has been held that there could be no recovery for such damage." Also, "The question, whether the improvement was ordered in the exercise of the police power, or in the exercise of some other power, is wholly immaterial to the plaintiff's case, because, no matter what the power in the exercise of which the ordinance of July 9, 1894, was passed, if the plaintiff's property was damaged as claimed in his declaration he is entitled to compensation."

Upon a review of the *Rigney Case*—which is the leading case as to the meaning and effect of the constitutional limitation that private property shall not be damaged for public use without just compensation being made therefor—and of the several decisions following the *Rigney Case*, I had come, before seeing Judge Adams' opinion, to the same conclusion at which he arrived upon this question. The following Illinois supreme court decisions fully sustain the appellate court: *Rigney v. City of Chicago*, 102 Ill. 64, and cases cited; *C. W. & I. R. R. v. Ayres*, 106 Ill. 511; *Zinc Co. v. La Salle*, 117 Ill. 411; *City of Bloomington v. Pollock*, 141 Ill. 346; *City of Joliet v. Blower*, 155 Ill. 414; *L. E. & W. R. R. v. Scott*, 132 Ill. 429; *Parker v. Catholic Bishop*, 146 Ill. 167; *Metropolitan W. S. Elevated Ry. Co. v. Stickney*, 150 Ill. 362; *Galt v. C. & N. W. Ry. Co.*, 157 Ill. 125; *Metropolitan W. S. Elevated Ry. Co. v. White*, 166 Ill. 375.

As said in the leading case, *Rigney v. City*, ante, the words "or damaged" in the 1870 constitutional provision, were intended "to declare a new rule of civil conduct from which

spring new rights which did not exist under the constitution of 1848." And that "we have no doubt it was the intention of the framers of the present constitution to require compensation to be made in all cases, where, but for some legislative enactment an action would lie by the common law."

There can be no question but that in a case like the present an action would lie at common law unless the corporation had the authority of an act of parliament, and in this state because of the constitutional provision referred to the legislature is without authority to exempt a municipality from its constitutional liability to make due compensation for all private property taken or damaged for public use. There can be no doubt but that the constitutional provision quoted was intended to give owners of private property a right of action for damages caused by improvements of this nature made for the public use or benefit.

**THE DEMURRER OF THE LAKE SHORE & MICHIGAN SOUTHERN
RAILWAY COMPANY AND OF THE CHICAGO, ROCK ISLAND
AND PACIFIC RAILWAY COMPANY.**

The railroads contend that as the city is not liable for the exercise of its police power under its governmental function in passing the ordinance, they are not liable for doing the work under the ordinance "any more than the laborer who shoveled the dirt," unless they were guilty of negligence in doing the work ordered by the city. If this contention could be sustained, the property owner would be between the "upper and nether millstone."

The disposal of the demurrer of the city disposes of this contention.

Objections are raised by the demurrers of the defendant railroad companies as to the declaration being double, in that it joins causes of action, as, for example, for damages sustained by changing the grade of Thirty-seventh street, which the city only had the right to do, making just compensation, with a cause of action against the railroad companies for negligence in building the elevation for the tracks, and that no joint liability is shown by the declaration.

I was at first inclined to think these objections were well taken. If we regard the excavation at Thirty-seventh street, the lowering of the sidewalk, the removal of the lamp-post, the building of the stone wall for the embankment over upon plaintiff's lot, the darkening or shutting off of light, the cracking of walls by reason of the excavation in Thirty-seventh street, and other injuries recited, as intended to be distinct, disconnected or separate acts and separate causes of action, there would be no denying that the declaration was double, in certain allegations, and that there is a misjoinder of parties defendants. They are not alleged as separate and distinct causes of action, but are allegations as to injuries inflicted in the performance of the entire work, from all of which injuries taken together and as a whole, the plaintiff's property was damaged, that is, lessened in value. Nor is it necessary to decide that any one of them, treated as a distinct and separate cause of action, would entitle the plaintiff to recovery. The particular injury might be over-balanced by actual benefits derived from the whole improvement, and, if so, no recovery could be had therefor. The question is whether or not plaintiff's property has, by reason of the improvement (as an entire and completed improvement) been lessened in value not whether any particular part of the work of itself, and without relation to the remainder of the work, caused an injury to plaintiff's premises.

The general rule is that in actions *ex delicto* agents and principals are alike responsible, and may be sued severally or jointly.

If a corporation authorizes a trespass, if it authorizes a work done which (if done as authorized) takes or damages private property for public use, "without just compensation," I can discover no reason why an action will not lie against the corporation or against its agent who does the wrongful act, or against both, for in torts, all concerned in the tort, he who orders as well as he who commits the action, are separately and jointly liable.

The action of trespass as well as case will lie against a municipal corporation: *Allen v. Decatur*, 23 Ill. 332; *Wolf v.*

Boettcher, 64 Ill. 317, 321; *Chicago v. McGraw*, 75 Ill. 566; *Chicago v. Turner*, 80 Ill. 419, and cases cited.

The question does not arise here whether or not the city may not by a proper ordinance—purely in the exercise of a governmental function—require a railroad to elevate its tracks, and this without the city incurring any liability, as, in this case, the ordinance is not only an ordinance, but is also an agreement, a contract between the city and the two railroad defendants. It must be viewed both in the light of an ordinance and of a contract. It is apparent from the face of it that it is beneficial to the city at large, and to the railway companies. If A and B enter into an agreement that B shall do certain work, which is beneficial to both parties, or that B shall do certain work on A's property, in connection with work to be done on B's property, or that B shall do certain work which it was A's duty to do, in connection with work which it was B's duty to do, and in the doing of such work the property of C was damaged, in either of such cases there can be no doubt but an action would lie against A or B or against both of them. It certainly makes no difference that one of such contracting parties might be a municipal corporation.

The complaint here is that the improvement, taking it as a whole, was the result of a concert of purpose and of action by and between the city and the two railway companies; that there was a joint purpose by this ordinance and contract to get these tracks elevated, viaducts built, streets and sidewalks lowered, other streets and alleys closed, and to make improvements in the manner and on the plan assented to by all the parties to the contract; that by reason of this concert of purpose, and co-operation of the city and railway companies in making the improvement in question, the plaintiff's property has been specially damaged and that all the parties so concerting together are liable, severally and jointly, as principals, for the special damages suffered by the plaintiff.

The constitutional provision cited was not intended to reach every possible injury that might be occasioned by a public improvement. *Rigney v. Chicago*, ante. The damages recov-

erable must be special to plaintiff's property and not arising solely from contiguity of properties. It is the public character of the improvement and the damages for public use which gives the right of recovery by reason of the constitutional provision cited.

It is not necessary for me to decide upon the validity of the contract by which the city agreed, in substance, to save the railway companies harmless from all damages caused to adjacent property owners, provided they were not the result of negligence on the part of the railway companies in the doing of the work, as that question is not before me. If such an agreement is valid as between the parties, it can have no effect upon the plaintiff's right of action as against either of the contracting parties.

The demurrer admitting that plaintiff's property has been damaged as alleged, by reason of the said improvement, and that he has received no just compensation therefor, the demurrer of all the defendants will be overruled and defendants ruled to plead in thirty days.

(Criminal Court of Cook County.)

People of the State of Illinois

VS.

Lake Shore & Michigan Southern Railway Company.

(January 1, 1893.)

CONSTITUTIONAL LAW—RAILROAD AND WAREHOUSE ACT—ACT REQUIRING WEIGHING OF CARS OF GRAIN UNCONSTITUTIONAL AS TO INTER-STATE SHIPMENTS. The act of June 15, 1887, prescribing the manner in which and conditions under which grain shipped from one point to another shall be weighed and transferred and that the weights so ascertained shall be given in the receipts or bills of lading is unconstitutional so far as it applies to any interstate commerce shipments, but the law so far as it applies to shipments made within this state to points of destination within this state is valid.

Criminal court of Cook county. Action of debt to recover penalties accruing for violation of sections 192 and 193 of railroad and warehouse act. Heard upon demurrers to special pleas before Judge Edward F. Dunne.

Francis A. Riddle, attorney for plaintiff.

Gardner & McFadon, attorneys for defendant.

The facts are stated in the opinion.

DUNNE, J.:—

This is an action in debt, brought by the people of the state of Illinois against the Lake Shore and Michigan Southern Railway Company, to recover from said company penalties accruing under sections 192 to 195 inclusive of the chapter on railroads and warehouses. Sections 192 and 193 of said act are as follows (Act June 15, 1887, Laws of Illinois, 1887, p. 253):

“192. Road receiving for transportation shall furnish suitable appliances for weighing, etc. 1. Be it enacted: That in all counties of the third class, and in all cities having not less than fifty thousand inhabitants, where bulk grain, millstuffs or seeds are delivered by any railroad transporting the same from initial points to another road for transportation to other points, such road or roads receiving the same for transportation to said points, or other connections leading thereto, shall provide suitable appliances for unloading, weighing and transferring such property from one car to another without mixing, or in any way changing the identity of the property so transferred, and such property shall be accurately weighed in suitable covered hopper scales, which will determine the actual net weight * * * which weights shall always be given in the receipts or bills of lading and used as the basis of any freight contracts affecting such shipments * * *

“193. Where original car runs through without transfer. * * * 2. The practice of loading grain, millstuffs or seeds into foreign or connecting line cars at the initial point from which the grain, millstuffs or seeds are originally shipped, or the running of the original car through without transfer,

shall not relieve the railroad * * * from weighing and transporting such property in the manner aforesaid. * * *"
Hurd's R. S. 1891, pp. 1113, 1114.

Section 195 provides, as a penalty for the failure of any railroad company to comply with the provisions of said act the sum of not less than \$100 nor more than \$500 for each neglect or refusal, "to be recovered in an action of assumpsit in the name of the people of the state of Illinois, for the use of the county in which such act or acts of neglect or refusal shall occur."

The declaration contains two counts, the first alleging that the rye in question was delivered to the defendant by William H. Beebe and company; and that after demand by William H. Beebe and company, the said defendant neglected and refused to issue or to give to the said William H. Beebe and company, or any one for them, a receipt or bill of lading for said carload of rye, giving and stating therein the true and correct weight of said rye; contrary to the form of the statute in such case made and provided.

The second count of said declaration alleges that the said carload of rye was delivered to the defendant company by the Chicago, Rock Island & Pacific Railway Company, and after demand the said defendant company refused to issue to the said William H. Beebe and company, or to any other person or persons, a receipt or bill of lading for said carload of rye, stating therein the true and correct weight thereof; but did eventually issue to the said William H. Beebe and company for said carload of rye, a bill of lading stating therein that said grain was "said to weigh 31,850" meaning said to weigh "31,850 pounds" and refused to ascertain the correct weight of said rye and to issue to said William H. Beebe and company or any other person, any other or different bill of lading; contrary to the form of the statute in such case made and provided.

To these two counts of said declaration said defendant company has pleaded *nil debit*; and secondly, especially, that the defendant company used and operated the railroad as, and that it was a part and parcel of a continuous line of railroad,

extending through and from the state of Illinois, into and through the states of Indiana, Ohio, Michigan, Pennsylvania and New York, upon and over which railroad the defendant is and was engaged as a common carrier in transporting and carrying for hire, persons and property from and out of each of the aforesaid states, into each of the other of said states; said railroad of the defendant then forming only a part of the entire route of carriage, the defendant being thus engaged in commerce between the several states; that the carloads of rye in the several counts of said declaration mentioned are one and the same carload of rye; and that the said carload of rye was delivered to the Chicago, Rock Island & Pacific Railway Company, doing business as a common carrier in transporting passengers and property from and through each of said states of Illinois and Iowa into and through the other thereof, on a railroad owned and operated by it, extending continuously through said last mentioned states, and said carload of rye having been received by it at Iowa City in said state of Iowa, to be transported by it to the city of Chicago, in the county of Cook and state of Illinois for hire; that said carload of rye was accordingly transported by said company to said city of Chicago, and delivered to the defendant company by said Chicago, Rock Island & Pacific Railway Company, consigned to William H. Beebe and company at Kerrmoor, Clearfield county, in the state of Pennsylvania; that the defendant thereupon accepted the same in the regular course of business, and as a common carrier, as aforesaid, undertook for certain reward to transport and carry said carload of rye to and into the state of Pennsylvania; that while it was in the course of transportation from and out of the state of Iowa to and into the state of Pennsylvania, for transportation by it as a common carrier for hire, out of the state of Illinois into and through the state of Illinois into and through the states of Indiana and Ohio into the state of Pennsylvania, it was engaged in, and was an instrument of commerce between the aforesaid states; and that therefore, the supposed law and the statutes of the state of Illinois, upon which said action is based, is null and void, by reason of be-

ing repugnant and contrary to the constitution of the United States, conferring upon congress the power to regulate commerce among the several states, and to the statute of the United States made and provided.

To the plea of *nil debet* the plaintiff replies *similiter*; and to the special plea it has filed a general demurrer. The demurrer to the special plea raises directly the constitutionality of the act passed by the Illinois legislature.

It is well settled that upon a demurrer to a plea the court must examine the whole record, and should decide in favor of the party who ought to prevail upon the whole of said record. I am of the opinion that the declaration itself is demurrable for the following reasons, to-wit: 1. The action is not brought for the use of the county where it is alleged the default and refusal to comply with the statute took place as provided by the statute in question. 2. Said declaration does not allege in either count that the defendant company failed to provide suitable appliances for unloading, weighing and transferring the rye in question from one car to another with mixing or in any way changing the identity of the property so transferred, and that it failed to accurately weigh said rye in suitably covered hopper scales; and failed or refused to give a receipt or bill of lading used as the basis of the freight contract, containing the actual net weight of the entire contents of said carload of rye.

Section 194 of the statute provides that "Any railroad company neglecting or refusing to comply promptly with *any and all* of the requirements of either sections 1 or 2 of this act shall be liable."

This being a *quasi*-criminal proceeding to recover a penalty, it must be construed strictly in favor of the defendant. Such a construction would require the plaintiff to allege in its declaration that the defendant failed or refused to comply with *all* of the requirements of said section.

The only allegation in either count of said declaration upon which they seek to recover the penalty in question is, that the defendant company neglected or refused to issue a receipt or bill of lading, giving and stating the true and correct

weight of said rye. So that upon these grounds alone I am of the opinion that my finding shall be for the defendant company. But aside from these technical objections, I am of the opinion that the plaintiff's demurrer to defendant's special plea must be overruled.

I am of the opinion that the act in question is in contravention of the constitution of the United States, and of the interstate commerce act, so far as it applies to or affects the goods and merchandise being shipped from other states, through the state of Illinois, to other states of the United States.

Clause 3, section 8, article 1, of the constitution of the United States declares that the congress of the United States shall have power "To regulate commerce with foreign nations, and among the several states, and with the Indian tribes." This power was reserved and retained by the federal government upon the adoption of the constitution by the several states, and the wisdom of the framers of the constitution in reserving this power to the government, can not be questioned.

Were each state to have the power of regulating commerce between it and sister states inextricable confusion would result. Each state, in the exercise of this power, would pass such regulations concerning commerce as it deemed for its best interests, independent of the interests of its sister states. The congress of the United States being vested with this power, it remains for us to ascertain whether there is power vested in the state of Illinois to pass such a law.

It has been maintained by reputable authority that in the absence of federal legislation, the several states may enact laws for the furtherance and facilitation of commerce between states, but it is universally conceded that such legislation must facilitate and not obstruct the commerce between states. *Patterson on Federal Restraint on State Action*, 124.

It has also been held, and in my opinion, it is undoubtedly the law, that a state may pass laws of local application to that state, and that the same is not an infringement on the rights of congress.

Let us examine the case at bar and determine, whether the

legislation in question is for the facilitation or furtherance of commerce; or whether it is of exclusively local application.

The plea demurred to sets up that the grain in question was shipped from Iowa City, Iowa, to Chicago, to be there transferred from the Chicago, Rock Island & Pacific Railway to the Lake Shore & Michigan Southern Railroad for shipment to Kerrmoor, Clearfield county, Pennsylvania. And the plea being demurred to this state of facts must be taken to be true.

Section 192 of the statute in question requires the defendant company to unload the grain from the car in which it was received into "suitably covered hopper scales, without mixing or in any way changing the identity of the property so transferred and weighed;" and to then endorse upon a receipt or bill of lading, the actual net weight of said grain, as ascertained by weighing same in hopper scales, then reload it upon a car and give such bill of lading to the shipper. Surely this can not be held to be in furtherance or facilitation of commerce. It necessitates the shipping of the car to a side track convenient to such a scale, the unloading of the grain into said scale, the weighing of the grain when so loaded upon said scale, and the replacing it upon the same or some other car; all of which must necessarily occasion loss of time, labor and expense; and all of which must eventually fall upon the shipper. It is a cumbrous, awkward way of ascertaining the weight of the grain in question; and must be, in the opinion of any rational man, a measure which retards and obstructs the quick transmission of merchandise, instead of facilitating the same.

Secondly: Is the law in question local in its application to Illinois? I am of the opinion that if a carload of grain was shipped from Chicago to Cairo in this state, that under the law in question the shipper would have the undoubted right to demand the weighing of the same in a hopper scale, and the endorsement of the weight thus ascertained on a bill of lading. But the law plainly shows upon its face that it applies to and covers not only a case of the shipment of grain from one point in a state to another point in said state, but

to all cases where grain is shipped in any city having not less than fifty thousand inhabitants, no matter what may be the point of original shipment or destination within the state or without. And so far as it does this it is certainly not of local application.

The case presented by the said plea shows that the shipment in this case was originally from Iowa City, in the state of Iowa, and that the destination of said rye was in Pennsylvania; and certainly the law applied to this case can not be of local application.

So far I have discussed this case upon the assumption that there was no legislation of the federal government upon the points covered by the statute in question; but an examination of the inter-state commerce act shows plainly that this is merely an assumption.

Section 7 of the Inter-State Commerce Act, which went into effect in the spring of 1887, a few months before the act of the Illinois legislature in question, provides: "That it shall be unlawful for any common carrier, subject to the provisions of this act, to enter into any combination, contract or agreement, expressed or implied, to prevent by carriage in different cars, or by other means or devices, the carriage of freights from being continuous from place of shipment to the place of destination."

This provision of the inter-state commerce act plainly indicates that it is the policy of the Federal government to further and protect in every possible way, the continuous shipment of merchandise without check or hindrance.

Even before the passage of the inter-state commerce act, the supreme court of the United States, in the case of *Wabash, etc., v. Illinois*, 118 U. S. 557, 572, declared that the right of continuous transportation from one end of the country to the other is essential, in the following language:

"It can not be too strongly insisted upon that the right of continuous transportation from one end of the country to the other is essential in modern times to that freedom of commerce from the restraints which the state might choose to impose upon it, that the commerce clause was intended to secure

This clause, giving to congress the power to regulate commerce among the states and with foreign nations, as this court has said before, was among the most important of the subjects which prompted the formation of the constitution. *Cook v. Pennsylvania*, 97 U. S. 566, 574; *Brown v. Maryland*, 12 Wheat. 419, 446."

Justice Walker, in the dissenting opinion delivered by him in the case of *Wabash, etc., v. People of Illinois*, 105 Ill. 253, declares in the following language that "The manifest purpose of that clause (i. e. 3 clause, section 8, article 1, of the Federal constitution) was to prevent impositions, burthens and obstructions on articles of commerce passing from one state to another, or such articles passing through states."

It will thus be seen that one of the strongest supporters of the right of state regulations of commerce, recognizes the object and purpose of the Federal government in preserving the right to regulate commerce between states. It thus appears, not only from the language of the interstate commerce act, but from the construction placed by state and Federal courts upon the intent and aim of the provision of the Federal constitution, that the policy of the Federal government has always been in favor of continuous and unrestricted transmission of property and passengers between the states.

The interstate commerce act, in section seven, makes it an offense to retard continuous shipments by carriage in different cars or other means or devices.

Such being the plain provision of the Federal constitution and Federal enactments, how can it be claimed that any state legislation which compels the unloading, separate weighing, and reloading of grain, can be held to be constitutional?

If the state of Illinois has the right to enact any such legislation in the face of this provision of the interstate commerce act, every other state in the union would have the same right, and the Federal constitution might be set at defiance. That the object and aim of this law was to protect the shipper and to secure to him the correct weight of the merchandise shipped, I have no doubt; and the law, as far as it relates to shipments made within this state to points of destination within this

state, will and should be upheld by our state courts. But when it seeks to affect, as it does in the case at bar, shipments to and from other states, notwithstanding the laudable object of the law, it is in direct conflict with the constitution of the United States and the legislation of congress, as set out in the interstate commerce act.

Counsel for the people have cited to me cases in which it has been held that provisions of a state law regulating the speed of trains and requiring trains to stop at county seats, were within the police power of the state, and not in conflict with the power preserved by congress of regulating commerce between states. I think a plain distinction can be made between this class of cases and the one under consideration.

State provisions, regulating the rate of speed and the stoppage at county seats, are really in the interests of and for the furtherance of commerce; and while they necessarily sometimes hinder the speed of trains, it is an undoubted fact that they are for the protection of the life, limb and property of passengers. They make commerce more safe and the Federal government has never legislated upon these points. While in the exercise of police power I have no question but that individual states may pass reasonable regulations for both passenger and freight trains, but when congress has once legislated on these same subjects, or indicated by its acts, its policy in reference to the same, if the state legislation is in conflict with the Federal, then in my opinion the local legislation must give way. Even the police power of the state, in the absence of Federal legislation, has its limitations.

Tiedeman's Limitations of Police Powers, 616, lays down the law as follows: "It is impossible for a state regulating the time and manner of making transfers of subjects of commerce transported by railway carriage from one point to another within the state, to extend the application of the regulation to freight that is being transferred to some point beyond the state." It will be found, upon examination, that all of the cases cited by counsel for plaintiff are based—*first*, upon statutes, passed in the exercise of police power, for the protection of the life, limb or property of citizens, where the

Federal authorities have not legislated upon the same; or—*secondly*, are statutes of purely local application, or—*thirdly*, laws passed by the state for the facilitation and furtherance of rapid transit of passengers or merchandise. The case at bar, in my opinion, does not fall under any of these classes.

The position I have taken in this matter is, I believe, abundantly sustained by the following, among other authorities: *County of Mobile v. Kimball*, 102 U. S. 691-702; *Welton v. Missouri*, 91 U. S. 275-280; *Original Package Case*, 135 U. S. 108; *Wabash, etc., Ry. Co. v. Illinois*, 118 U. S. 577. In *Council Bluffs v. K. C., St. J. & C. B. R. Co.*, 45 Iowa, 349, it was sought, by a statute of the state of Iowa, and an ordinance of the city of Council Bluffs, to compel the defendant railway company to receive and transfer its passengers and freight in the city of Council Bluffs instead of running them across the river to Omaha; and the court, in discussing the several authorities in which it had been held that the levying of licenses or taxes upon railroads and others by state law, was unconstitutional, as imposing a burden upon the transportation of interstate commerce, declares that, "The same principles upon which the statutes were held invalid apply to the statutes creating burdens or imposing restrictions of a different character. Commerce may suffer no more from a law requiring a direct tax to be paid thereon into the state treasury, than from a regulation under which charges will be exacted by individuals, as would be the case of transferring freight from the cars of one railroad to those of another at state lines when the connecting roads form continuous lines over which freight may be carried without change of cars. And a regulation of the state whereby the most speedy transit is prevented may be a greater burden upon interstate commerce—a greater embarrassment to it, than taxes of the character held invalid in the cases above cited. Celerity in the transportation of passengers and freight is now imperatively demanded by the business of the country; every impediment thereto is a burden upon commerce. State statutes producing such results are, under the authorities cited, clearly in conflict with the constitution of the United States. Subjects of

legislation of this character, which are in their character national, affecting the whole country, and confided by the constitution to the general government, are exclusively within the legislative control of congress."

In the case of *Stanley v. Wabash, St. L. & P. R. R. Co.*, 42 Am. & Eng. R. R. Cas. 328, the supreme court of Missouri held that "A statute requiring a railroad company to furnish double deck cars for transporting sheep, was unconstitutional as to an interstate shipment."

In *H. & St. J. R. R. Co. v. Houston*, 95 U. S. 473, a statute of Missouri, prohibiting the entry of Texas cattle at certain times of the year was held bad, as being in violation of the commerce provision of the constitution.

In *Norfolk & W. R. Co. v. Commonwealth* (Va.), 13 S. E. 345, the court held that a statute of the state of Virginia, prohibiting the running of freight trains within certain hours on Sunday, was bad, as being in conflict with the commerce provision of the constitution of the United States.

After careful consideration of the matter, I am of the opinion that this statute, so far as it relates to shipments made from other states through the state of Illinois to other states of the United States; and in so far as it relates to the cases presented by the pleas, is unconstitutional and void; and therefore the demurrer to said plea should be overruled.

(Circuit Court of Cook County. In Chancery.)

Thomas H. Purcell, et al.

vs.

Pittsburgh, Cincinnati, Chicago & St. Louis Railway
Company, et al.

(November 10, 1893.)

1. CARRIERS—DEMURRAGE OR CAR-SERVICE CHARGES—LIEN FOR DEMURRAGE OR CAR-SERVICE CHARGES UPON OTHER SHIPMENTS. A carrier cannot hold one consignment of freight for demurrage or car-service charges which had occurred upon another consignment,

or for any sums which might be due the carrier upon other accounts, or for other general indebtedness.

2. **CARRIERS—PRIVATE SIDE-TRACKS—DUTY OF CARRIER TO MAKE SIDE-TRACK CONNECTIONS, AND TO DELIVER ON SUCH SIDE-TRACKS.** A railroad company is bound by law in this state and by a fair interpretation of the constitution of the state not only to allow switch connections to be made, but to deliver cars of coal on such side-tracks, where a shipper has yards and side-tracks connected by switches with the tracks of the railroad company.
3. **CARRIERS—DELIVERY UPON PRIVATE SIDE-TRACKS—WHEN LIABILITY OF CARRIER CEASES.** When a carrier has placed cars upon a side-track for delivery, the relation of common carrier ceases.
4. **CARRIERS—DEMURRAGE OR CAR-SERVICE CHARGES—LIEN.** A carrier has a lien upon specific goods for reasonable demurrage or car-service charges accruing upon such goods.
5. **CARRIERS—RIGHT OF CONSIGNEE WHERE UNREASONABLE DEMURRAGE OR CAR-SERVICE CHARGES ARE IMPOSED—PAYMENT UNDER PROTEST—REPLEVIN.** If a carrier makes an unreasonable demurrage or car-service or other charge, the owner or consignee can make tender replevin or pay under protest.
6. **CARRIERS—DEMURRAGE OR CAR-SERVICE CHARGES—LIEN.** The complainant filed a bill for injunction alleging that the defendant refused to deliver certain cars of coal because complainant was indebted to defendant railroad for car-service or demurrage charges which had accrued upon prior shipments, and that the defendant claimed a lien upon such cars of coal for demurrage or car-service charges accruing thereon. A mandatory injunction was sought to compel the railroad company to deliver to complainant the cars of coal in its possession, and to continue to deliver coal as received. A preliminary injunction was issued. Upon hearing *held* that the railroad had a lien upon the specific shipment for demurrage charges accruing thereon, but that the railroad had no lien on such shipment for demurrage or car-service or other charges accruing on other shipments and could not refuse to deliver cars on that account.

Bill for a mandatory injunction. Heard before Judge Oliver H. Horton.

STATEMENT OF FACTS.

Thomas H. Purcell & Bro., coal dealers in the city of Chicago were accustomed to receive coal in carload lots over the Pittsburg, Cincinnati, Chicago & St. Louis Railroad. In December, 1891, the railroad company refused to deliver certain

cars of coal which were then in its possession, the agent of the company claiming that the Purcells were indebted to the company for car-service charges which had accrued upon prior shipments of coal, and also for the cost of laying certain side-tracks, and also for car-service charges which had accrued upon the specific car held. Under the rules and regulations of the railroads entering Chicago, as promulgated by the car service association, a consignee is allowed a certain number of days for receiving and unloading freight, the time being longer on coal than any other class of freight. Purcell filed his bill in the circuit court, asking for a mandatory injunction compelling the railroad company to deliver the cars of coal then in its possession, and to continue to deliver coal as received, setting forth that the railroad company claimed to hold the coal then in its possession not only for charges which had accrued but for charges upon prior shipments, which had been delivered, and also for the expense of building a side-track. A preliminary injunction was granted upon the bill. The car-service association afterwards appeared in the case, filed an answer and a cross-bill, and upon a reference of the case to master in chancery I. K. Boyeson, evidence was taken and a hearing had upon bill and answer, cross-bill and answer, and upon the evidence taken. Both in the pleadings and at the hearing, the railroad company made no attempt to claim any lien on the freight for charges which had accrued on prior shipments of freight or for any sums due for the construction of a side-track. The only claim made by counsel for the car-service association was that the specific freight in the possession of the railroad company at the time of the filing of the bill should be held for the specific charges which had accrued upon that freight by reason of alleged unreasonable delay on the part of the complainants in receiving and unloading the cars. The master in chancery held that a railroad company could not hold one consignment of freight for any charges which had accrued upon another, or for any sums which might be due the railroad company upon other accounts, such as the construction of side-tracks; and the master also held that the railroad company had a lien upon

the freight in question under the published notices, rules and regulations, and provisions in the bill of lading, all of which provided that freight should be subject to car-service or demurrage charges at the point of destination; and after careful and equitable computation he found that the sum of forty dollars was due the railroad company for car-service charges.

Exceptions were taken to the master's report, and the case was heard and argued before Judge Horton.

William Burry, solicitor for complainants.

Walker & Eddy, solicitors for defendants.

HORTON, J. (orally):—

I have not prepared a written opinion in this case. While I have examined many of your authorities, I have not felt it necessary to review all these authorities in a written opinion. What I have to say, therefore, is more in the nature of my conclusions in the matter, with some references to the facts and the law.

The question as originally presented in this case by the bill Thomas Purcell filed originally, was the right of the railroad company to hold his coal, claiming a lien thereon for charges on former shipments and for a claim of a balance due for construction of side-tracks into his yard. An injunction was granted upon that bill, and that position has since been substantially abandoned by the present counsel in the case, and I think wisely abandoned, for no court could sustain such a position as claimed by the freight agent, I think it was, of the railway company—could not sustain it at all. The question, however, that has now been presented to the court, is this: The complainant is the receiver of large quantities of coal shipped in bulk, from Ohio, I believe it is, from out of the state. It is claimed on the part of the railway company that the defendant unnecessarily delayed the unloading of the cars, and that the railway company has a right to a car-service charge or demurrage, or whatever you please to name it, for the use of these cars beyond a reasonable time for unloading, under the rules. The case was originally wisely

brought, in my opinion, and would have been sustained upon the issue as originally presented.

There have been elaborate oral arguments and I have been furnished with very elaborate printed briefs in the case. The freight was coal in bulk. The complainant had a yard and side-track connected by switches with the defendant railway company's tracks. The railway company was therefore bound by law in this state, and I think by a fair interpretation of the constitution, by the constitution of the state, not only to allow that switch connection to be made, but to deliver the coal in the yard of the defendant on the track, or rather, deliver the cars loaded on the track. Were it not for the case of the *Chicago & Northwestern R. Co. v. Jenkins*, 103 Ill. 588, this court would have had no serious trouble in this case. That case at first seems to be conclusive of the question now before the court. That case was decided upon an agreed statement of facts, and at my request I have been furnished with and have examined a copy of this agreement as filed in the supreme court which passed upon the case. When the facts in that case are examined and compared with the details of the case at bar, it will be seen that they differ materially. For instance, a sentence from their opinion, on page 600, the supreme court say: "But the mode of doing business by the two kinds of carriers is essentially different." That is, carriers by sea and carriers by rail, the opinion not recognizing, though not excluding, that carriage by water on our lakes is carriage by sea. "Railroad companies have warehouses in which to store freights. Owners of vessels have none. Railroads discharge cargoes carried by them. Carriers by ship do not, but it is done by the consignee. The masters of vessels provide in the contract for demurrage, while railroads do not, and it is seen these essential differences are, under the rules of the maritime law, wholly inapplicable to railroad carriers."

It appears in the evidence, and perhaps the court should take judicial cognizance of the fact that the railway company has no warehouse for the storage of coal shipped in bulk. Another difference in facts is that the railroad company is

required by law to deliver its coal into the complainant's yard. Again, it is the duty of the consignee to unload this coal, the same as it is the duty of the consignee to unload a vessel. There is no demurrage as such, in a technical sense of demurrage, claimed in this case. There was no bill of lading accompanying the coal, but it was the custom as between this railway company and this consignee and the consignor, to ship the coal without bills of lading. I do not know what the railway's custom is. They have some sort of checks or bills for the use of their conductors, and they are delivered with the goods.

In these essential facts and elements, the case at bar differs from the case of *C. & N. W. Ry. v. Jenkins*, 103 Ill. 588.

It is argued that the railway companies might impose great hardships upon shippers if allowed a lien upon freight for such reasonable charges as have accrued for the use of cars after reasonable time has elapsed for unloading, and indeed, that might be so, and the argument impressed me with considerable force. But on the other hand, if the railway company has the right to store freight, such as coal, upon the expiration of forty-eight hours or whatever time is considered reasonable, they might run the cars out and store them on vacant property from which the carriage would be more than the coal is worth. That is, if railways were inclined to subject shippers to inconvenience, the opportunities would be quite as great under one method of doing business as under the other.

As remarked by the supreme court in the *Jenkins Case* (103 Ill. 588), there can be no such lien except by contract or where it is allowed by law. There are many classes of cases where a lien is allowed, and where, without any specific contract to that effect, the law sustains it, such as inkeepers, agisters, carriers, bailees and warehousemen. Demurrage, as such, technically, can not be sustained, but the right of lien is not limited here technically to the word demurrage, or to what may be defined demurrage. When the railway company placed the cars in the yard, the relation of common carrier ceased, it seems to me. When these cars were shunted

onto the side track in the yards of the complainant, then the relation of common carrier ceased; but was not the railway company furnishing storage for this party? Substantially the same relation exists when cars were set upon a side track ready to be delivered and complainants did not receive them. It seems to me that the company, under such circumstances, would be sustained in so leaving the coal in cars, and considering the class of freight, it is a proper place to store it. It would not be the proper place to store paper, such as was the subject matter of the *Jenkins Case* (103 Ill. 588), but it would be for bulk coal. Whether it be called demurrage or car service, or whatever it may be, it seems that the company is entitled to a lien for proper charge. If they make an unreasonable charge, the plaintiff can make tender, replevin or pay under protest.

It is claimed that the railway company has the right to sue for the charge, whatever it may be. That is undoubtedly true, but in this case the proof shows that this coal is sometimes sold in carload lots from one person to another, and passes through several hands while it remains on the cars of the company; that the complainants sell it in bulk and have the cars put into their yards and the purchaser takes the coal off the cars, the purchaser doing the unloading and the complainants having nothing to do with it.

If the company is to look to the parties in a civil suit for the money, they have to sue as many parties as were owners of the coal while it remained on the cars. I do not think that a reasonable rule for the court to establish. The railways have no right to throttle a man as this company undertook to, according to the bill originally filed. They can not hold freight in their possession for charges which have accrued upon freight delivered or for other general indebtedness. That was the allegation of the bill as originally filed, but in the case as finally submitted to the court, the question raised was as to the right of the company to hold freight for car service or storage charged which had accrued upon that particular freight. The amount involved in the case is small, and the court has not taken the time to exhaustively review

the figures and accounts submitted in evidence, for I apprehend that it makes little difference to counsel whether the amount awarded be a few dollars, more or less, for whether the claim be for one dollar or for forty dollars or more, the principle is the same and it is the question of law which the court must decide and which is of importance in the case. Therefore the finding of the master as to the amount due the railroad company is not disturbed.

So far as I have seen or examined the facts of the cases like the *Jenkins Case* (103 Ill. 588), which hold that the railway company must unload and store, the freight involved was such as could be unloaded and stored in warehouses; none of the cases applied to property such as coal, which can not be readily and practically unloaded and stored.

Perhaps the proper order would be the dismissal of the bill for want of equity, but counsel may confer together and prepare an order in accordance with the opinion of the court.

NOTE

DEMURRAGE OR CAR-SERVICE CHARGES.

- I. Reasons for demurrage charges.
- II. Lien of carrier for demurrage charges.
 - (A) Carrier has lien for demurrage charges.
 - (B) Cases *contra* that carrier has no lien for demurrage charges.
 - (C) Liability of consignee for demurrage accruing at any time on the shipment.
- III. Validity of car-service associations.
- IV. Right of a carrier to refuse to switch shipments to private side tracks because of unpaid demurrage charges on other shipments.
- V. Right of carrier to assess demurrage charges when connecting line or consignee is unable to receive the shipment.
- VI. Statutes in relation to demurrage charges.
- VII. Reciprocal demurrage.

I.

REASONS FOR DEMURRAGE OR CAR-SERVICE CHARGES.

The reason for, and the justice of, demurrage charges made by carriers is well stated in *Swan v. L. & N. R. R. Co.*, 106 Tenn. 229, 61

S. W. 57 (1901), where it is said: "If a road can not make a reasonable charge for detention of its cars by consignees, it is evident that such consignees may delay unloading until virtually the entire rolling stock of the road may be tied up, and its traffic obstructed by loaded cars, awaiting the pleasure or convenience of consignees. We can see no reason why carriers should not be entitled to reasonable compensation for the unreasonable delay and detention of their cars by consignees." And in *Ky. Wagon Mfg. Co. v. Ohio & Miss. V. Ry. Co.*, 98 Ky. 152, the court held that prompt delivery and transporting of freight could not be had by railroads "if their rolling stock may be tied up and waterlogged upon the private sidetracks and switches of consignees to serve as store rooms and warehouses for their freight," and "how can they furnish cars and transportation to shippers in general, and discharge the volume of traffic business of their respective systems, if their rolling stock can be locked up in the private yards of special consignees?" In *Dixon v. Central of Georgia Railway Co.*, 110 Ga. 173, 35 S. E. 369 (1900), the court said: "Demurrage was no doubt adopted as a convenient term to represent the storage of goods in cars, as distinguished from the storage in warehouse. The right to charge for such storage in cars arises when the goods are necessarily detained by virtue of the failure of the shipper to comply with his obligations to the carrier. The company is in this way deprived of the use of its cars, and, even if the rules adopted in this particular case as to such charges did not apply, they would still be entitled to reasonable charges as a warehouseman or as a depository for hire."

II.

LIEN OF CARRIER FOR DEMURRAGE CHARGES.

A. Carrier Has Lien for Demurrage.

It is almost universally held that a carrier has the right to make reasonable demurrage or car-service charges, and to enforce a lien on the goods shipped for the payment of such charges.

Alabama: Construction Co. v. R. R. Co., 121 Ala. 621, 25 So. 579 (1899); *So. R. R. Co. v. Lockwood Mfg. Co.*, 142 Ala. 322, 37 So. 667, 68 L. R. A. 227 (1904).

Georgia: Dixon v. Central of Ga. Ry. Co., 110 Ga. 173, 35 S. E. 369 (1900); *Penn. Steel Co. v. R. R. & Banking Co.*, 94 Ga. 636, 21 S. E. 577 (1894).

Illinois: Schumacher v. C. & N. W. Ry. Co., 207 Ill. 199, 69 N. E. 825 (1904); *C. C. C. & St. L. R. Co. v. Probst Lumber Co.*, 114 Ill. App. 659 (1904); *C. P. & St. L. R. Co. v. Dorsey Fuel Co.*, 112 Ill. App. 382 (1904); *Woolner Distilling Co. v. Peoria & Eastern Ry. Co.*, Ill. App. Ct. (2d. Dist.), No. 4816, decided Nov. 20, 1907; *Purcell v. P. O. C. & S. L. R. Co.*, 2 Ill. C. C. 378.

Kansas: Larrabee Flour Mills Co. v. M. P. Ry. Co., 88 Pac. 72 (Kan. Jan. 12, 1907).

Kentucky: Ky. Wagon Co. v. Ohio & O. Ry. Co., 98 Ky. 152, 32 S. W. 595, 36 L. R. A. 850 (1895).

Massachusetts: Miller v. Mansfield, 112 Mass. 260 (1873).

Mississippi: Yazoo & M. R. R. Co. v. Searles, 83 Miss. 721, 37 So. 939, 68 L. R. A. 715 (1905); *N. O. & N. E. R. R. Co. v. George*, 82 Miss. 710, 35 So. 193 (1903).

Missouri: Owen v. R. R. Co., 83 Mo. 454, 464 (1884); *McGee v. Ry. Co.*, 71 Mo. App. 310, 314 (1897); *Darlington v. R. Co.*, 99 Mo. App. 1, 72 S. W. 122 (1902).

Ohio: B. & O. R. Co. v. Fisher, 3 Oh. N. P. 122, 5 Oh. Dec. 659 (1894); *N. Y. L. E., etc. R. Co. v. Seiberling*, 8 Oh. C. C. 593, 4 O. C. D. 210; *Phillips v. Erie Ry.*, 14 Oh. Dec. N. P. 706, 27 Oh. C. C. 486 (1905).

Tennessee: Swan v. L. & N. R. Co., 106 Tenn. 229, 61 S. W. 57 (1901).

Texas: T. & N. O. R. R. Co. v. Kolp (Texas) 88 S. W. 417 (1905); *Hunt v. M. & I. T. Ry.* (Texas) 31 S. W. 523 (1895); *Baumbach v. T. O. & O. F. Ry.* (Texas) 23 S. W. 693 (1893).

Virginia: R. R. Co. v. Commonwealth, 102 Va. 599, 46 S. E. 911 (1904); *R. R. Co. v. Adams*, 90 Va. 393, 18 S. E. 673, 22 L. R. A. 530 (1894).

Wyoming: K. P. Ry. Co. v. McCann, 2 Wyoming 3 (1877).

United States: Michie v. N. Y. N. H. & H. R. Co., 151 Fed. 644 (1907); *Millers' Ass'n v. P. & R. Ry. Co.*, 8 Inter. Com. Rep. 531 (1900); *Blackman v. So. R. Co.*, 10 Inter. Com. Rep. 353 (1904); *Kehoe v. C. & W. O. Ry. Co.*, 11 Inter. Com. Rep. 531 (1905); *Mason v. R. R. Co.*, 12 Inter. Com. Rep. 70.

Canada: Duthie v. Grand Trunk Ry. Co., 4 Can. Ry. Cas. 304 (1906).

England: Carrington v. London & N. W. Ry. (1905) 2 K. B. 437.

B. Cases contra, That Carrier has no Lien for Demurrage.

In several of the older cases it was held that a carrier had no lien for demurrage charges, but some of these cases have been overruled by later decisions. *C. & N. W. Ry. Co. v. Jenkins*, 103 Ill. 588 (overruled by *Schumacher v. C. & N. W. Ry.*, 207 Ill. 199, 212); *B. & M. R. Co. v. Chicago Lumber Co.*, 15 Neb. 390, 19 N. W. 451 (1884), 18 Neb. 303, 25 N. W. 94; *R. R. Co. v. Hunt*, 83 Tenn. 261 (1885), overruled in effect by *Swan v. L. & N. R. Co.*, 106 Tenn. 229, 61 S. W. 57 (1901).

In *Pennsylvania*, however, it is declared that a carrier can lawfully charge demurrage. *Penn. R. R. Co. v. Midvale Steel Co.*, 201 Pa. St. 624, 51 Atl. 313 (1902). But in *Nicolette Lumber Co. v. People's Coal Co.*, 213 Pa. 376, 62 Atl. 1060, 3 L. R. A. (n. s.) 327, 110 Am. St.

550 (1902), it was held that although a carrier can charge demurrage, it has no lien on the goods for demurrage charges, citing as authority, *C. & N. W. Ry. v. Jenkins*, 103 Ill. 528, a case overruled by *Schumacher v. C. & N. W. Ry.* 207 Ill. 199, 212. And in a later decision the Pennsylvania court has held to the same effect relying on its decision in 213 Pa. 376; *Wallace v. B. & O. R. Co.*, 216 Pa. 311, 65 Atl. 665. (Pa. Jan. 7, 1907.)

C. Liability of consignee for demurrage accruing at any time on the shipment.

It has also been held in several cases that a consignee is bound to pay demurrage charges under a provision in a bill of lading accepted by the consignor that the shipment should be subject to such charges. *Penn. R. v. Midvale Steel Co.*, 201 Pa. 630, 51 Atl. 213; *Y. & M. V. R. Co. v. Searles*, 83 Miss. 721, 37 So. 939, 68 L. R. A. 715, 734.

III.

VALIDITY OF CAR-SERVICE ASSOCIATIONS.

Car-service associations, which are combinations of various railroad lines for the purpose of collecting and enforcing uniform demurrage charges are *not* illegal combinations.

Georgia: Miller v. Cent. Ga. R. R. & Banking Co., 88 Ga. 563, 15 S. E. 316, 18 L. R. A. 323 (1891).

Kentucky: Ky. Wagon Co. v. Ohio & C. Ry. Co., 98 Ky. 152, 32 S. W. 595, 36 L. R. A. 850 (1895).

Mississippi: Yazoo & M. V. Ry. Co. v. Searles, 83 Miss. 721, 37 So. 939, 68 L. R. A. 715 (1905).

Ohio: Phillips v. Erie Ry. Co., 14 Oh. Dec. N. P. 706, 27 Oh. C. C. 486 (1905). In *Kansas* however by an act of 1907 (*Laws of Kansas, 1907, ch. 250*) car-service or demurrage associations have been declared illegal.

IV.

RIGHT OF A CARRIER TO REFUSE TO SWITCH SHIPMENTS TO PRIVATE SIDE TRACKS BECAUSE OF UNPAID DEMURRAGE CHARGES ON OTHER SHIPMENTS.

The demurrage on car-service rules adopted and enforced by the various car-service associations generally contain a rule that agents will decline to switch cars to private sidings of consignees who refuse to pay or unnecessarily defer settlement of bills for demurrage. For example the rules of the Chicago Car-Service Association, effective July 14, 1907, contain the following rule: (Rule 17 C) "When cars are detained on private tracks beyond the free time for loading or unloading, and car-service charges are not promptly paid, the agent of the railroad company delivering such cars will, after giving

five days' notice, decline to switch cars to private tracks of such parties, and will thereafter tender freight from public team tracks, and collect freight charges before delivery, until such time as satisfactory guaranty is given that car-service rules will be complied with."

The courts generally hold, however, just as in the principal case of *Purcell v. P. C. C. & St. L. R. Co.*, that a carrier cannot refuse to switch shipments to private sidetracks because of unpaid demurrage or car-service charges on other shipments.

In *So. Railway Co. v. Lockwood*, 142 Ala. 322, 37 So. 667, 68 L. R. A. 227, it was held that if a delivery of part of the goods had been made before the time for unloading has expired, the railroad company was entitled to retain possession of the remainder to secure the payment of demurrage charges subsequently accruing.

And in *N. O. & N. E. R. E. Co. v. George*, 82 Miss. 710, 35 So. 193, where six cars out of twelve constituting a shipment and upon which demurrage charges had accrued had been delivered without payment of the charges having been made, the carrier was held entitled to hold the remaining six cars to secure the payment of demurrage charges upon the twelve cars.

In *Penna. Steel Co. v. Ga. R. R. & Banking Co.*, 94 Ga. 636, 21 S. E. 577, it was decided that a railroad company had the right to retain from each consignment one or more cars to secure itself for the freight and demurrage it claimed on such consignment.

In *Eastern Ky. Ry. Co. v. Holbrook*, 4 Ky. Law Rep. 730, it was held that a carrier cannot refuse to receive freight because back charges for other shipments have not been paid.

In *Phillips Co. v. Erie Railway*, 27 Ohio C. C. 486 (1905), an opinion of a lower court, it appeared that the Phillips Company had refused to pay demurrage charges which had accrued upon cars consigned to it and delivered upon its switch. The railroad company thereupon refused to deliver cars upon the private siding of the Phillips Company, but placed them upon its regular public team track to be unloaded. The plaintiff brought an action to compel the railroad to receive cars from other railroads and switch them upon plaintiff's siding. The railroad set up in its answer the rule of the Cleveland Car-Service Association providing in substance, that when cars are ordered to a private siding for unloading and the party so ordering them is delinquent in the payment of car-service charges, defendant's agent should decline to place cars on such private siding until such delinquency should be made good, and should thereupon notify the party using such private siding that his freight would be delivered or received only upon the defendant's public team track until such delinquency should be made good. The court held as a matter of law that such rule was reasonable and valid.

But in *Yazoo & M. V. R. Co. v. Searles*, 83 Miss. 721, 37 So. 939,

68 L. R. A. 715 (1905), it appears that Searles refused absolutely to pay any car service or demurrage charges upon any and all cars delivered on a spur track leading to his warehouse, and that thereupon the carrier refused to switch cars for Searles until accrued demurrage charges were paid. In this case the consignee announced that he would not pay any demurrage charges that had already accrued or that thereafter might accrue and the court held that under such circumstances, the carrier might refuse to switch cars; but the court also held, that if there was merely a dispute as to the amount of the demurrage charges a carrier would not be justified in refusing to switch cars until demurrage charges on other shipments had been paid. The rule of the Louisiana Car-Service Association provided: "On deliveries to private sidings, in cases where consignees or consignors refuse to pay, or unnecessarily defer settlement of bills for car-service charges, the agent will decline to switch cars to the private sidings of such parties, notifying them that deliveries will only be made on public delivery tracks of company and will promptly notify the manager of the action taken." The court in the course of its opinion states the law:

"But it is further said that appellee's wrongful action did not justify the railroad company 'in violating its common-law and statutory obligation' to appellee to deliver freight; this conclusion, of course, being founded on the principle that, in the discharge of its duty to the public, no corporation enjoying a public franchise can conduct its business according to the whim or caprice of its agents, or can arbitrarily, without special reason refuse to serve any one seeking its service. Limiting that general principle to the matter here in dispute, it is likewise true that no carrier has the right, on account alone of a dispute arising from a doubt as to the correctness of a particular bill or several bills for demurrage already past due, or an honest difference of opinion as to the justice of the charge on any number of cars already received and delivered, to refuse to 'switch and place' other cars subsequently received. No carrier can refuse its services to anyone desiring them on the ground alone of an unadjusted claim then pending, or on account of any previous violation of contract by such person, no matter how flagrant and inexcusable, if such person, at the time the service is demanded, is legally entitled thereto. A refusal on the part of the carrier for such case would entitle the person aggrieved or injured to recover full compensation; and, if such action was dictated by vindictive motives, or by a desire to wantonly oppress and injure the particular person, the offending carrier would be liable to punitive damages as well. But this result follows not because the carrier was a member of a car-service association, but by reason of the firmly established and rigidly adhered to rule of law which makes the master respond in damages, both actual and exemplary, for every wanton and willfully

oppressive violation of duty by the servant, where the servant committing the wrong be a car-service association or other agent or employe. This principle of law is of universal application. It is the duty of the appellant primarily to 'switch and place' all cars coming over its own line or tendered to it with proper 'transfer switching charge' by any connecting line. It was the duty of the appellee to pay all freight charges and demurrage charges due on his freight and the cars containing the same. This, by contract entered into evidenced by the bills of lading, he had bound himself to do. So long as appellee complied with his contract, he had the right to insist on faithful and prompt compliance on his part of appellant. More than this, even if, on account of doubts and disputes as to the correctness or justice of special instances of charge, freight charges or demurrage had been withheld pending adjustment, this would not, of itself, absolve the carrier from the discharge of its duty as to the other car loads of freight subsequently received. No past violation of contract on the part of a consignee can justify a carrier in failing to discharge a present duty."

In *Larrabee Flour Mills Co. v. Missouri Pac. Ry. Co.*, 88 Pac. 72 (Kan. Jan. 12, 1907), it appears that the plaintiff asked for a writ of mandamus to compel the defendant carrier to switch cars to the transfer tracks accessible to plaintiff. Car-service charges had been assessed against the plaintiff who admitted and offered to pay part of the items, but disputed other items. The agent of the carrier demanded payment of the whole bill stating that a claim for a refund for excess charges could be presented to the car-service association. This the plaintiff declined to do, and the carrier then refused to make further delivery to the plaintiff of empty cars placed on the transfer track for its use until payment should be made. The rules of the Missouri Valley Car-Service Association provided:

"Sec. 2. On deliveries to private sidings, should consignees or consignors refuse to pay or unnecessarily defer settlement of bills for car service, the agent will decline to switch cars to the private siding of such parties, notifying them that deliveries will only be made to them on the public delivery tracks of the company, after the payment of freight charges at his office. Agent will promptly notify manager of action taken."

The court held:

"Rule 9 in its application to this case, and the special order issued for the purpose of coercing the plaintiff, are not reasonable. A shipper ought not to be compelled to pay an unjust charge for car service with no redress, but to submit a claim for the return of his money to the manager of the association promulgating the rule or order. The weight of authority seems to be that the carrier has a lien for compensation for the use of cars beyond reasonable free time. If the lien be waived the courts are open. But the car-service

association holds no franchise to compel the payment of claims of this kind, and then to decide for itself whether or not it will refund. And, in any event, a carrier cannot justly withhold its services when it is equally at fault in the matter of which it complains."

And likewise in the principal case of *Purcell v. P. O. C. & St. L. R. R. Co.*, 2 Ill. C. C. 378 (Circuit Court, Cook Co., Ill., 1893), it was held that a railroad could not hold freight in its possession and refuse to switch cars to a private sidetrack because of unpaid demurrage charges on other shipments. And also in *Union Brewing Company v. C. B. & Q. R. R. Co.*, 1 Opinions Illinois Railroad Commission, 61 (1890), it was held that nonpayment of demurrage charges on former shipments does not justify a refusal by the carrier to switch other cars, the commission saying: "We are of opinion that respondent is not released from the legal duty of switching, by the failure of complainant to pay demurrage charges." And the same ruling is also made in *Lyon & Scott v. P. & P. U. Ry. and The Illinois Car-Service Association*, 1 Opinions Illinois Railroad Commission, 69 (1890).

In *Stahl v. B. & M. R. Co.*, 71 N. H. 57, 51 Atl. 176 (1901), it was held that where a carriers' agent refuses to deliver freight transported by it, claiming to hold it for demurrage charges on cars previously transported for the plaintiff, until he can consult his superiors, which he immediately does, and in compliance with their orders, offers the freight before action is brought, such refusal to deliver is not sufficient evidence of conversion of the goods by the carrier.

V.

RIGHT OF CARRIER TO ASSESS DEMURRAGE CHARGES WHEN CONNECTING LINE OR CONSIGNEE IS UNABLE TO RECEIVE THE SHIPMENT, OR WHEN THE CONNECTING LINE HAS DECLARED AN EMBARGO.

The car-service rules generally contain a provision that when consignees are unable to receive freight or to unload cars and for such reason the delivering line refuses to accept cars from connecting lines consigned to such consignee, the agent of such line holding cars which thus cannot be delivered shall notify the consignee, and shall charge car-service if delivery cannot be affected within a certain time, or within the time allowed for reconsignment.

When a carrier is unable to handle all the goods which are tendered, it may in such case legally claim the right to suspend service either as to certain classes of traffic or altogether, and thus declare an embargo. But it is proper that reasonable and timely notice should be given to connecting carriers of the embargo in order to prevent congestion of cars in freight junction yards. *Daish v. R. R. Co.*, 9 I. C. C. 520; a carrier has however no right to declare an em-

embargo against one individual shipper or consignee while at the same time it makes deliveries to other shippers or consignees at the same point. *Rogers v. R. R. Co.*, 12 I. C. C. 353 (1907).

In *Grand Rapids & Indiana R. R. Co. v. Diether*, 10 Ind. App. 206 (1894), it appears that a car of lumber was shipped from Arkansas directed to Diether at "Fort Wayne, Indiana, Ft. W. C. & L. Delivery," meaning delivery at the station of the Lake Shore & Michigan Southern at Fort Wayne, which was used by the Ft. W. C. & L. Ry. Co. The car was delivered to the Grand Rapids & Indiana Railroad Company, and was hauled by it to its yards in Fort Wayne. The terminus of the G. F. & I. R. Co. was at a Y about one and one-half miles from its station, and one mile from the L. S. & M. S. depot, the destination of the car. According to the usual mode of doing business the G. R. & I. Co. would put the car upon this Y whence it would be taken by the connecting line. The L. S. & M. S. R. Co. refused to accept the car and assume the freight charges in response to a telephone message. No effort was made by the G. R. & I. Co. to make an actual delivery of the car to the L. S. & M. S. R. Co. The G. R. & I. Co. then notified Diether that it held the car at its station and would hold same for charges and also for accruing demurrage. Diether tendered the amount of the freight charges but refused to pay the accrued demurrage. The court held that the duty of the R. G. & I. Co. was to carry the car to the end of its line and there deliver it to a connecting carrier to be forwarded to its final point of destination, and that a carrier which has received goods for carriage without requiring prepayment, does not become entitled to demand its freight charges until its duty has been performed, either by delivery or an offer to deliver at the place of destination, and that the G. R. & I. Co. could not rightfully claim that its charges should be paid until it had carried the goods to the end of its line and was ready to deliver them to the succeeding carrier, or had shown a good excuse for its not being done.

In *Woolner Distilling Company v. Peoria & Eastern Ry.* (Appellate Court, Second District, Illinois, Nov. 20, 1907), it was held that a carrier can lawfully assess demurrage charges on cars held in its distributing or storage yards awaiting delivery on the side track of the consignee, where the consignee is unable on account of its inadequate facilities to accommodate all the cars upon its private side track, and is consequently unable to receive cars upon their arrival. The court there said: "Appellant practically insists that because it had room for only five cars it had a right to compel the railroads to store the remaining twenty-five to forty-five carloads of coal for it at its pleasure and without any expense to appellant, and that it could defeat the right of the railroads to charge storage by not furnishing the railroads a place where the cars could be delivered. We think this position unjust. When the terminal had placed the

cars in the Kickapoo yards and had notified appellant that they were ready for delivery, and forty-eight hours had passed and appellant was not able to receive them, the terminal had done all it could do to deliver the coal, and it is just that appellant should pay a reasonable charge for the storage of the cars. It could avoid this result by providing a place where the coal could be unloaded promptly which it had ordered in advance.

VI.

STATUTES IN RELATION TO DEMURRAGE CHARGES.

In several of the states there are statutes in relation to demurrage charges and in many of the states, especially those states in which reciprocal demurrage statutes have been passed (referred to *infra*), comprehensive laws on the subject exist. Statutes in relation to demurrage exist in the following states: *Alabama* (Laws of 1907, page 161); *Arkansas* (Acts of 1907, ch. 239); *Colorado* (Laws of 1907, ch. 208); *Connecticut* (Statutes 1902, secs. 3774, 3775); *Florida* (Laws of 1893, page 138); *Georgia* (Code 1895, secs. 2200-2209); *Indiana* (Laws of 1907, Act March 11, 1907); *Kansas* (Laws of 1905, ch. 345; Laws of 1907, ch. 275); *Minnesota* (General Laws of 1907, ch. 23); *Mississippi* (Code of 1906, sec. 4843); *Missouri* (Laws of 1905, page 100; Laws of 1907); *North Dakota* (Laws of North Dakota 1907, ch. 200); *Oklahoma* (Laws of 1905, page 143); *Oregon* (Laws of 1907); *Pennsylvania* (Laws of 1907, page 229); *South Carolina* (Code of 1902, sec. 2094); *South Dakota* (Laws of 1907, ch. 216); *Texas* (Laws of 1907); *Washington* (Laws of 1907, ch. 142).

VII.

RECIPROCAL DEMURRAGE.

Reciprocal demurrage statutes under which a carrier is liable to the shipper for a penalty if a car is not furnished for shipment within a certain period after demand therefor, and a shipper or consignee is liable for a demurrage charge on cars detained after a certain period of time have been enacted in the following states: *Alabama* (Laws of 1907, page 161); *Arkansas* (Acts of 1907, ch. 239); *Colorado* (Laws of 1907, Act March 22, 1907); *Indiana* (Laws of 1907, Act March 11, 1907); *Kansas* (Laws of 1907, ch. 275); *Minnesota* (General Laws of 1907, ch. 23); *Missouri* (Laws of 1907; Laws of 1905, page 100); *North Carolina* (Laws of 1907, ch. 217); *North Dakota* (Laws of North Dakota, 1907, ch. 200); *Oklahoma* (Laws of 1905, page 143); *Oregon* (Laws of 1907); *South Dakota* (Laws of 1907, ch. 216); *Texas* (Laws of 1907); *Washington* (Laws of 1907, ch. 142). In *Mississippi* the Railroad Commission has been held to have power to make rules to reciprocal demurrage. *Y. & M. V. R. Co. v. Keystone Lumber Co.*, 43 So. 604 (Miss. Apr. 15, 1907).

Reciprocal demurrage statutes and regulations have been upheld as constitutional. *Stone v. Atl. Coast Line R. Co.*, 56 S. E. 932 (N. C. 1907); *Y. & M. V. R. Co. v. Keystone Lumber Co.*, 43 So. 605 (Miss. Apr. 15, 1907); *Patterson v. Mo. Pac. Ry.* (Kan. Feb. 8, 1908).

It should be noted however that in *Houston & Texas Cent. R. v. Mayes*, 201 U. S. 321 (Apr. 2, 1906), a Texas statute absolutely requiring railroads under penalties engaged in interstate commerce to furnish certain numbers of cars on a specified day to transport merchandise into another state regardless of every other consideration except strikes and other public calamities was held to transcend the police power of the state and to amount to a burden upon interstate commerce, and when applied to interstate shipments, void as a violation of the commerce clause.—Ed.

(Circuit Court of Vermillion County.)

People

vs.

Will J. Davis.

(March 9, 1907.)

1. **ORDINANCES—BUILDING ORDINANCE OF CHICAGO IMPOSES NO DUTY.**
The building ordinance of the city of Chicago in force in 1903 providing that there shall be on the stage of theater buildings certain apparatus and equipment and providing that there shall be certain exits in such buildings imposes no personal duty upon the manager, owner or agent of such theater or upon the officers of the theater company owning the building, and consequently there can be no violation of such ordinance by such person, and the ordinance is void.
2. **ORDINANCES—POWER TO PRESCRIBE BUILDING ORDINANCES WITHIN FIRE LIMITS.** Under the city and village act the city council may pass a fire limits ordinance prescribing limits within which there shall be no wooden buildings erected, but the city has not the power to fix territorial limits within which the construction of buildings is regulated by ordinance.
3. **ORDINANCES—CITIES AND VILLAGES—BUILDING ORDINANCES MUST APPLY TO ENTIRE CITY.** In assuming to regulate buildings, the manner of their construction, the materials of which they may be erected, etc., outside of the one question of the erection of wooden buildings within the fire limits, city ordinances must be applicable to all the people of the city, subject them all to the same penalties, and apply to the entire city and not to designated districts within the city.

4. ORDINANCES—DISCRIMINATION IN AS AFFECTING VALIDITY. The city of Chicago has not the power to enact an ordinance that a theater in one part of the city must provide certain equipment for the protection of human life, while theaters in other parts of the city are not required to provide the same equipment.
5. CITIES AND VILLAGES—BUILDING ORDINANCES—CONSTRUCTION OF. The provisions of the building ordinances of the city of Chicago requiring certain equipment for theaters were made a part of the fire limits ordinance of Chicago for the purpose of protecting and preserving human life, and not for the purpose of preventing the spread of fire or a conflagration.
6. CLASS LEGISLATION. It is not the law that two men doing precisely the same thing and guilty precisely of the same acts in the same city, can one of them be guilty of murder, and the other not guilty of an offense worthy of a fine.
7. ORDINANCES—INDEFINITENESS OF. An ordinance applying only to assembly halls for "large" gatherings of people is void for indefiniteness and uncertainty.
8. ORDINANCES—DELEGATION OF POWER TO NONOFFICIAL BODY. The section in the building ordinance of Chicago prescribing certain equipment to be approved by the board of Fire Underwriters is not rendered void because delegated to a nonofficial body, inasmuch as such provision is separable and does not affect the remainder of the section.
9. STATUTES—CONSTRUCTION OF PENAL STATUTES. The rule of construction is that when an offense is claimed to be a violation of a penal statute, that offense must be so plainly stated that he who runs may read.
10. PRACTICE—DUTY OF COURT TO SET ASIDE INVALID INDICTMENT OR DIRECT A VERDICT WHEN CONVINCED OF INVALIDITY OF INDICTMENT. A judge convinced of the invalidity of an indictment upon which a defendant is being tried, would stultify himself and violate his oath of office if he did not set aside the indictment or direct a verdict for the defendant.
11. PRACTICE—CRIMINAL TRIALS—RIGHT OF DEFENDANT TO VERDICT. Where upon a trial upon an indictment after a jury has been empanelled and sworn, the state asks that a *nolle prosequi* be entered, the defendant is nevertheless entitled to a verdict from the jury, if he so demands. After the jury is sworn the defendant is entitled to a verdict.
12. PROXIMATE CAUSE—MANSLAUGHTER—VIOLATION OF ORDINANCES. Semble, upon motion to suppress the introduction of ordinances in evidence upon which indictment for manslaughter is based there are serious questions which could not properly be raised upon the motions, such as the proximate cause of

the death, and whether or not there could be any legal violation by the mere violation of the city ordinance where no element of willfulness or wantonness is alleged.

13. **MANSLAUGHTER—INDICTMENT FOR MANSLAUGHTER CANNOT BE SUSTAINED WHEN BASED UPON AN ORDINANCE THAT IMPOSES NO DUTY.** Where a building ordinance imposed no duty upon the defendant to do the things therein required, an indictment for manslaughter, based upon the omission of the defendant to perform the regulations prescribed by the ordinance, cannot be sustained.
14. **MANSLAUGHTER—INDICTMENT FOR MANSLAUGHTER CANNOT BE SUSTAINED WHEN BASED UPON VOID ORDINANCE PRESCRIBING FIRE LIMITS.** An indictment for manslaughter cannot be sustained when based upon omission to obey an ordinance which is void as beyond the power of the city council, because it attempts to prescribe building regulations within designated fire limits not applicable to the entire city.
15. **INDICTMENT FOR MANSLAUGHTER BASED UPON VIOLATION OF A CITY ORDINANCE.** The defendant, Will J. Davis, as manager of the Iroquois Theater at Chicago and as president and director of the Iroquois Theater Co., was indicted for manslaughter for omitting to provide certain equipment for the theater and neglecting to conform to certain building restrictions in the construction of the theater building in violation of the building ordinances of the city of Chicago. Upon trial before a jury upon a motion to suppress the introduction of the ordinances in evidence before the jury, *held* that the ordinances were void, (1) because they impose no duty upon the defendant and (2) because they were beyond the power of the city to pass since they attempted to regulate the construction of buildings within designated fire limits not extending over the entire city. and verdict accordingly was directed for the defendant.

Indictment for manslaughter. Upon trial of case before a jury upon motion to exclude introduction of ordinances upon which indictment was based. Verdict directed for defendant. Heard before Judge E. R. E. Kimbrough in circuit court of Vermilion county.

STATEMENT OF FACTS.

The defendant Will J. Davis was the manager of the Iroquois Theater in Chicago, and president and director of the Iroquois Theater Company. On December 30, 1903, a fire

broke out upon the stage of the theater among the scenery, and 600 persons who were attending a performance were suffocated and burned to death. The defendant Will J. Davis was indicted for manslaughter, on February 25, 1904, together with Thomas J. Noonan and James E. Cummings. A motion for a change of venue was made by Noonan and Cummings and granted and the case as to them transferred to Peoria county for trial. The opinion upon this motion for a change of venue is reported in *People v. Davis*, 1 Ill. C. C. 191. The defendant Davis moved to quash this indictment and upon February 9, 1905, the indictment was quashed. *People v. Davis*, 1 Ill. C. C. 217. Subsequently upon March 4, 1905, a second indictment for manslaughter was returned against the defendant Will J. Davis, charging him with manslaughter as the result of the same fire. A petition for a change of venue from Cook county on the ground of local prejudice was filed on March 10, 1905, and a motion to quash this second indictment was also filed. This motion to quash was heard in June, 1905, and on January 23, 1906, the motion to quash was denied as to four of the counts and sustained as to two of the counts of the indictment. *People v. Davis*, 1 Ill. C. C. 245. The pending motion for the change of venue was then heard in June, 1906, and upon June 14, 1906, the motion was granted, and the case was transferred to Vermillion county for trial. *People v. Davis*, 1 Ill. C. C. 207. The case was called for trial in Vermillion county in March, 1907, and a jury was selected and empaneled. An opening statement was made to the jury in behalf of the state, and the defense reserved its statement of the case until the close of the plaintiff's evidence. The witnesses present for the state were sworn and one witness was introduced and asked four questions when a motion was made by the defense to compel the state at the inception of the case to introduce the ordinances upon which the indictment was based.

The motion was granted, and the defense thereupon objected to the admission of the ordinances in evidence. After full argument upon behalf of the state and the defense the objection to the admission of the ordinances was sustained.

and the jury were directed to return a verdict of not guilty, which was done and the jury discharged.

The four counts remaining in the indictment after the motion to quash were each based upon alleged violations in different particulars of a certain ordinance of the city of Chicago in relation to buildings. The provisions of the ordinance relied upon were pleaded in each of the counts of the indictment.

The *first count* alleged: That on December 30, 1903, there were certain valid and subsisting laws and ordinances of said city of Chicago, which defined and prescribed the fire limits of said city of Chicago and classified buildings situated therein, and which required theaters of class V to have over the stage a flue pipe of not less than one-thirtieth (1-30) of the total area of the stage, and opened and closed by a circuit battery, with a switch to be placed in the ticket office in the said building and theater, and to have a sign with the words and figures, to-wit: "Move switch," etc., printed on it, and to also have a switch placed near the electrician's stand on the stage in such buildings, and that such buildings should have a system of automatic sprinklers, to be supplied with water from a tank located not less than twenty feet (20) from the highest part of the roof of said building, said sprinklers to be placed above and below the stage in said buildings, and that there should be kept portable fire extinguishers and fire pumps, axes and hooks, and that the owner, agent, lessee or occupants of said building of class V with accommodations for one thousand (1,000) or more people, should employ an expert fireman, and that the owners, lessees and managers of every such building should cause a diagram of said building to be printed on the program of any entertainment to be given in said building, and which said laws and ordinances provided a penalty for any violation thereof, which said ordinances are as follows, to wit:

Sec. 214^{1, 2}: "The fire limits of the city of Chicago are

¹ The references to the sections do not occur in this indictment.

² Page 2068 Ordinances of March 28, 1898.

defined as follows: 'The fire limits of the city of Chicago as defined by existing ordinances, shall be all that part of the city of Chicago bounded by the following limits, excepting the territory lying within the lines commencing at the intersection of * * *.' (Here follows a detailed boundary of the fire limits by streets.)

"No wall, structure, building or part thereof, will hereafter be built, constructed, altered or repaired within the fire limits of the city of Chicago, except in conformity with the provisions of this ordinance. * * *"

Sec. 65^{1, 2}: "As a means of reference, buildings erected within the fire limits * * * shall be divided into classes as follows: * * * classes IV and V. These shall include all buildings used as assembly halls for large gatherings of people, whether for purposes of worship, instruction or entertainment. * * *"

"Buildings of class IV embrace all buildings in which no movable scenery is used upon the stage thereof."

"Class V embraces all buildings in which movable scenery is used."

Sec. 184^{1, 4}: "There shall be over the stage of every building of class V a flue pipe of sheet metal construction, extending not less than fifteen feet above the highest part of the roof, over the stage of said building, flue shall have an area of at least one-thirtieth of the total area of the stage. The dampers for flue shall be made of metal and opened by a close circuit battery; and switch to be placed in the ticket office and one placed near the electrician's station on the stage, each to have a sign with the words printed on it 'Move switch to left in case of fire to get smoke out of building.'"

Sec. 185^{1, 5}: "In every building of class V a system of automatic sprinklers to be supplied with water from a tank lo-

¹ The references to the sections do not occur in this indictment.

² Page 2030 Ordinances of March 28, 1898.

⁴ Page 2060 Ordinances of March 28, 1898.

⁵ Page 2060 Ordinances of March 28, 1898.

cated not less than twenty (20) feet above the highest part of roof of building. Sprinklers shall be placed above and below the stage; also in paint room, store room, property room and dressing rooms, if they are in or connected with class V building, and not separated by approved double iron doors. Tank not to be connected to stand pipe and ladder system, but to have separate pipe for filling from fire pump, and a 3-inch iron pipe extending from tank to outside building, with siamese connections for fire department use. The entire sprinkler equipment to be approved by the Commissioner of Buildings, Fire Marshal and Board of Underwriters of Chicago."

Sec. 188^{1,6}: "In buildings of class V, and also class IV, where stationary scenery is used, there shall always be kept for use portable fire extinguishers or hand fire-pumps, on and under the stage; in fly gallery and in rigging loft, also at least four fire department axes, two 25-foot hooks, * * * all subject to the approval of the fire marshal."

Sec. 192^{1,7}: "Every portion of any building of class IV and V devoted to the use or accommodation of the public, also all outlets leading to the streets, including the open courts and corridors, stairways and exits, shall be well and properly lighted during every performance, and the same shall remain lighted until the entire audience has left the premises."

Sec. 186^{1,8}: "It shall be the duty of the owner, lessee or manager of every building of class IV and V during the performance, of which programs are issued, to cause a diagram showing the exits of such buildings to be printed on such programs."

Sec. 216^{1,9}: "Any person, firm, company or corporation, who violates, disobeys, omits, neglects or refuses to comply with or who resists or opposes the execution of any of the

¹ The references to the sections do not occur in this indictment.

⁶ Page 2061 Ordinances of March 28, 1898.

⁷ Page 2062 Ordinances of March 28, 1898.

⁸ Page 2061 Ordinances of March 28, 1898.

⁹ Page 2068 Ordinances of March 28, 1898.

provisions of this ordinance, shall be subject to a fine of not less than \$25 nor more than \$200; and every such person, firm, company or corporation shall be deemed guilty of a separate offense for every day such violation, disobedience, omission, neglect or refusal shall continue, and shall be subject to the penalty imposed by this section for each and every separate offense; and any builder or contractor who shall construct any building in violation of any of the provisions of this ordinance, and any architect designing or having charge of such building who shall permit it to be so constructed, shall be liable to the penalties provided and imposed by this section."

That there was then and there a certain building and theater, called the Iroquois Theater, operated and used for the purpose of giving a certain theatrical performance, and that said building and theater was before then planned, constructed, erected and built for the purpose of giving therein divers theatrical performances; that there was in said building a stage, movable and stationary scenery, and a large auditorium and assembly room, and a large number of seats placed therein for the accommodation and seating of divers persons congregated to witness said theatrical performance; and there was then and there a certain ticket office, where tickets were sold for compensation to divers persons to attend said theatrical performance and that said Iroquois Theater was used as an assembly hall for large gatherings of people for the purpose of instruction and entertainment, and that a large gathering of people was then and there gathered for the purpose of witnessing said theatrical performance and entertainment; and said Iroquois Theater was used as a theater and was a building of class V, situated within the fire limits of Chicago: "That the said building and theater aforesaid, was then and there owned by the Iroquois Theater Company, a corporation, and was then and there occupied by and in the possession of the said Iroquois Theater Company, a corporation;"

That William J. Davis was then and there the president of

said Iroquois Theater Company, and managing director of the same, and the general manager of said theater and building for said Iroquois Theater Company, "and was then and there in absolute management and control of said building and theater, with full power and authority to open, close, manage, direct and do all other things within said building and theater as he, the said William J. Davis, then and there might determine;"

That said Davis, as such president, director and manager, was then and there producing and causing to be produced a certain theatrical performance, commonly known as "Mr. Bluebeard, Jr." in said building and said Davis opened said building and theater to the public to witness said theatrical performance, and invited the public for compensation into said building and theater for the purpose of witnessing said production, and there was then and there assembled in said building and theater to witness said performance, to wit, 1,800 persons in response to said invitation; that there was then and there on the stage in said building in use in the production of said theatrical performance a large amount of stationary scenery and a large number of curtains, draperies, borders and drops, and a large number of incandescent lights, spot lights, flood lights, calcium lights, hood lights, open lights, etc.; that said stationary scenery, curtains, borders, etc., were highly combustible; and that there was on said stage and in the said stationary scenery and among said borders and draperies a fire, and because of the combustibility and inflammability of the said scenery, borders and drops, said fire spread among said draperies rapidly, and produced a large amount of smoke, heat, gas and flame; that said laws and ordinances hereinbefore set forth did then and there require said building and theater to be equipped with the appliances, equipments and things in said laws and ordinances, for the purpose of providing means of extinguishing any fires which might occur in said building and theater, or on the stage thereof, and for the purpose of then and there protecting the lives of the people there assembled; that it

was then and there the duty of said Davis, as president, director and general manager of said corporation and as the general manager of said building and theater, then and there in possession and management of said building and theater to use due caution and circumspection in providing for the safety of the lives of the persons then and there assembled, to wit: The public, and it was then and there the duty of said Davis to use due caution and circumspection to protect said persons so assembled from injury and death by fire, and to protect said building and theater from destruction or injury by fire, and to use due caution and circumspection in equipping, providing and supplying said building and theater with equipment, apparatus and things required by the said ordinances of said city; that said Davis was then and there authorized and empowered to furnish, equip and supply said building and theater with said appliances and things required by said laws and ordinances;

That said Davis then and there undertook for and on behalf of said Theater Company to construct, equip, supply and furnish said building and theater with the said appliances, apparatus, equipment and things in said laws and ordinances required; that there was not then and there over said stage a flue pipe extending "not less than fifteen feet above the highest part of the roof over said stage;" and there was not then and there over said stage a flue pipe "having an area of not less than one-thirtieth of the total area of said stage;" and there was not over said stage flue dampers made of metal to be opened by circuit batteries; and there was not then and there a switch placed in the ticket office with the words "Move switch," etc., printed on it; and there was not then and there a switch placed near the electrician's station on the stage with said words printed on it; and there was not then in said building and theater a system of automatic sprinklers supplied with water from a tank located not less than twenty feet above the highest part of said building and theater, nor were sprinklers placed above and below the stage, nor in the fly gallery or rigging loft, nor was there in any

place in said building any portable extinguishers or hand fire-pumps, nor any ax nor hooks on each tier or floor of said stage, nor on any tier or floor of said stage, nor in said building, all of which said Davis then well knew.

That said Davis did then and there "negligently fail and omit" to have in and about said building or theater, or on said stage the matters so required by said laws and ordinances of said city of Chicago; that one Viva R. Jackson was one of the large number of persons assembled in said building and theater to witness said theatrical performance, and that said William J. Davis, while then and there the president, director and general manager of said Iroquois Theater Company and the manager of said building and theater, and of said stage, for and on behalf of said corporation, and then and there in possession, management and control of said theater and building and in behalf of said Theater Company, in and upon the body of her, the said Jackson, did unlawfully, negligently and feloniously and without due caution and circumspection, make an assault, and that said fire on said stage could have been extinguished had there been in said building and on said stage the fire apparatus, appliances, equipment and things required by said ordinances and laws and which said fire could then and there have been extinguished if there had been in said building and on said stage any portable fire extinguishers, or any fire-pumps, as provided by said laws and ordinances, and which said fire could have been extinguished if there had been in said building and theater, over and above said stage, automatic sprinklers as provided by said ordinances, and which said fire could have been extinguished had there been on said stage and in the fly galleries and rigging and loft thereof in said building, any fire hooks and axes as required by said laws and ordinances; but by reason of the lack of fire appliances, equipment and things as aforesaid, and by reason of the lack of portable fire extinguishers, fire-pumps, fire hand-pumps, fire hooks and axes, and automatic sprinklers, said fire was not then and there extinguished and could not then and there

be extinguished; that by reason of said fire being on said stage and in and among said scenery, there was then and there caused a large amount of fire, smoke, heat, gas and flame to be then and there upon and over said stage, and that thereupon, by reason of the lack of any flue dampers and switches, as required by said laws and ordinances, the said large amount and quantity of fire, smoke, heat, gas and flame could not and did not then and there go through the roof above said stage, and was not confined to said stage, and that by reason of the lack of said sprinklers and the water tank as required by said laws and ordinance, said large amount of fire, smoke, heat, gas and flame could not and was not then and there extinguished and put out.

That if there had been the proper flue dampers and switches, said fire, smoke, heat, gas and flame could and would have gotten through the roof over said stage and if there had been sprinklers and a tank above said building, as aforesaid, the said amount of fire, smoke, heat, gas and flame, so being around, about, upon and over said stage, could have been extinguished and put out by the same, and that by reason of the lack of apparatus, equipment, appliances or things so as aforesaid required by the said laws and ordinances, said large amount of fire, heat, smoke, gas and flame was not thrown off through the roof, and was not extinguished, and was not confined to said stage. That the said Davis did by reason of his said neglect by not providing the said apparatus, appliances, equipment and things required by said laws and ordinances for the safety of the persons assembled in said theater, and for the safety of said Jackson, and in not then and there seeing that there was provided the apparatus, and things required for the safety and protection of the life of said Jackson, and by then and there being engaged as aforesaid in his said business in the management, control and possession of said building and theater, without due caution and circumspection, which was his duty then and there to use, unlawfully, negligently and feloniously cause a large amount of fire, smoke, heat, gas and flame to issue, pour and go over

said stage and against and upon said Jackson, whereby the said Jackson was mortally burned and said Jackson was then and there asphyxiated, suffocated, strangled and choked, by which said Jackson died on said December 30, 1903; and that the said death was caused by the negligence of said Davis "by his not then and there seeing that there was then and there provided apparatus, appliances, equipment and things, as aforesaid, as required by the laws and ordinances of the said city of Chicago aforesaid, to be in and about the said building and theater and on said stage as aforesaid, for the protection of the life of said Viva R. Jackson, and by then and there not using due caution and circumspection as aforesaid while so being engaged in his lawful business," and that said Davis did then there negligently, unlawfully and feloniously kill and slay, contrary to the statute and against the peace and dignity of the state of Illinois.

The *second count* sets out the same ordinances as the first count, but charged the defendant Davis as the president and director of the corporation and manager and agent of the building and theater and in control and management of said building and theater, with full power and authority, and in management and control of said theater and building and as producing and having produced and causing to be produced and managing the production of said theatrical performance and that he undertook to see that said building was constructed and equipped.

The *third count* sets out the same ordinances as the first two counts, but differed in alleging that the theater building was in course of erection and not wholly completed and that it was then and there opened and used, and that the defendant Davis was the owner and occupant of the building and theater and in possession and control of the same, and that Davis placed the drapery borders and curtains of the scenery so that they came in contact with a light on the stage and were ignited.

The *fourth count* was a restatement in a different way of the first count and set up the same ordinance, but differed in

charging the defendant Davis as manager of the building and theater empowered, authorized and invested with authority by the owners of said building to procure and furnish the apparatus, etc., required by the laws and ordinances referred to, and that he undertook and assumed the duty to furnish, supply and equip said building and stage with the apparatus required by said laws and ordinances, and that he had taken upon himself the care, management and control of the building and theater.

John W. Keeslar, state's attorney of Vermilion county, *James J. Barbour*, assistant state's attorney of Cook county, *George T. Buckingham*, *Walter T. Gunn*, and *Charles Troup*, attorneys for the people.

Levy Mayer, *W. J. Calhoun*, *Joseph B. Mann*, *Isaac B. Craig* and *A. S. Austrian*, attorneys for defendant, *Will J. Davis*.

KIMBROUGH, J. (orally):¹

Before attempting to pass upon the question raised by this objection, it seems almost a necessity that I tender to counsel on both sides of this case my hearty thanks for the very able and exhaustive presentation of the law applicable to this case. Never, in my experience at the bar, or upon the bench, have I seen a court more favored by the labor of counsel than I have been in this matter. The vast number of cases which have been cited, not only the decisions of the courts of this state, but practically of nearly all the states of the union, as well as the decisions of the federal courts, have been cited, explained, the salient points pointed out, and everything that would aid the court to a correct solution of the question, has been done by counsel. It seems to me needless to say to attorneys possessing the ability of the attorneys on both sides of this case, that the court cannot consider anything except legal questions. We have nothing to do with

¹ This opinion was rendered orally by Judge Kimbrough immediately after the close of full arguments extending over a period of four days.—Ed.

moral guilt; and moral guilt may exist in contradistinguishment from legal guilt. I will illustrate what I mean, because it may have application to the principles involved here. If I should see my friend, Col. Buckingham, with a broken leg, helpless by the roadside, and I was going upon a journey to my own business and he should call upon me to bring to him a surgeon, and I excused myself, and passed on, without rendering him that assistance, and leaving him on the highway to die, I would unquestionably be guilty—morally guilty—of murder. But can anybody say I would be guilty of legal murder? No duty is enjoined on me by the law towards him. My punishment would be the just censure and reproach of my fellowmen, but I would not be legally accountable. I may know that my neighbor is starving, or that his family are dying for want of physicians and care. I may go on my way offering him no assistance, refusing to administer to their wants, and not be legally responsible for that act. In order to make me responsible, there would have to be a legal duty enjoined upon me to render or minister to their relief. If I occupied the position of overseer of the poor, if a duty was enjoined upon me by law, and probably if I stood in any contract relationship with them, whereby I owed them a duty even by contract, more especially if that duty was enjoined upon me by law, and I then neglected to minister to their want and to offer them the assistance that the exigencies of the case required, I believe that I would be legally guilty.

It is also proper, I think, to say, that I did not know the nature of this indictment, even whether it was founded on some alleged violation of a common law duty, or that it was founded on an ordinance of the city of Chicago, until some time about the middle of last week, when a copy of the opinion of Judge Kavanagh¹ came into my possession. I never saw the indictment. The only knowledge I had of it until the case was called here, and one counsel handed to me this printed copy of the ordinance, was the information that I gleaned from the printed opinion,—the copy of the opinion of Judge Kavanagh

¹ *People v. Davis*, 1 Ill. C. C. 245.—Ed.

in this case. I read that opinion three times before this case was called for trial, thinking that probably I had not thought of all of the points on which the Judge ruled when he refused to quash the indictment in this case. Of the many points that have been raised herein on this objection, two points at least occurred to me then. Having some little familiarity with the municipal law, gained in the practice, and in filling the office of corporation counsel of this little city, the first thing that I looked for in that ordinance was to see wherein any duty was enjoined in expressed language upon this defendant, and I must confess, however much I may have desired to have found it, I did not possess sufficient intellect to ascertain wherein that duty is enjoined. I believe the state's attorney will bear me out when I say that I asked him if they had no other law upon which to found this prosecution than that which is cited and relied on in that opinion. That was only upon my own impression of the law governing this case, made without any investigation of the authorities, and only upon my own recollection of the principles of law which I thought underlaid this indictment. The next question was whether or not it could be the law of the state of Illinois that two men, doing exactly the same act, performing the same service, and guilty of precisely the same negligence, absolutely alike in every respect, brick for brick, shingle or slate for shingle,—everything entering into the construction of a building, everything relating to the equipment of the building, and everything lacking that was to be provided, being precisely the same by both men; that one of those men might not be guilty of anything, and the other man be liable to imprisonment in the penitentiary for the term of his natural life.

These two questions occurred to me upon examining this opinion of Judge Kavanagh, although one of them was not alluded to in the opinion, and so far as the opinion discloses, not argued before him,—i. e., whether or not this ordinance was void because it assumed an authority which had not been delegated to the city by the statute. So firmly grounded was

I in the opinion that the city council had no power except that which was expressly delegated to it, and that every ordinance that the city council might assume to pass would have to rest upon some special grant of power to the city, contained in the statute itself, that I could not for a moment believe, and I cannot yet, that there can be any question as to the law upon that subject. Unless that authority is conferred, unless the state has surrendered so much of its sovereignty in express language, and conferred the power upon the city council to legislate in the manner in which it has assumed to legislate, there is no binding force or validity in its enactment.

An ordinance which is commonly called a fire limits ordinance is authorized by one of the sections, or clauses, or rather, of the general section covering the powers of city councils; but I am inclined to agree with counsel for the defense that the limitations contained in this clause, or rather the expression of the powers that the city council have, which are made in that clause, are to the exclusion of other powers not therein expressed. And when it says that the city council may pass a fire limits ordinance in which there shall be no wooden buildings erected, and the further provision of that section or clause which allows the city to condemn a building that is destroyed by fire or use, or otherwise, to the extent of fifty per cent of its value, that that clause cannot be extended beyond the three things embraced within it. That the clause giving to the city council the right to regulate buildings, the preceding clause, as I recollect it, is not by its terms nor has it any clause within that section,—at least none that have been pointed out to me, and I am aware of none,—that gives them the right to circumscribe the territorial limits in which they shall apply.¹

¹ The sections of the city and village act defining the powers of the city council applicable to the question are as follows: (Rev. St. Ill. ch. 24, art. 5, sec. 62.)

Sub-div. 61. "To prescribe the thickness, strength and manner of constructing stone, brick and other buildings, and construction of fire escapes therein." (301)

While I was carried away, partly, by the splendid argument of Mr. Buckingham, a better argument than I thought any man could have made on that side of the controversy under the law as it stands, and as I understand it, I took home with me from the state's attorney's office the volume of the supreme court reports which contained the decision that he relied on, rendered by Justice Field of the supreme court. (*Barbier v. Connelly*, 113 U. S. 27.) And it seems to me at least clear that those decisions were based upon the fire ordinance of San Francisco, or the board of supervisors, as they are called, and that contained power, and that the constitution and statutes of the state of California gave to the board of supervisors of the city and county of San Francisco, the power to enact any ordinance that is not in conflict with the laws of the state of California. Of course no one will contend—no lawyer I believe—that the decisions cited

Sub-div. 62. "The City Council and the president and trustees of villages for the purpose of guarding against the calamities of fire, shall have power to prescribe the limits *within which wooden buildings shall not be erected or placed*, or repaired, without permission, and to direct that all and any buildings *within the fire limits* when the same shall have been damaged by fire, decay or otherwise, to the extent of 50 per cent. of the value shall be torn down or removed, and to prescribe the manner of ascertaining such damage." (301)

Sub-div. 63. "To prevent the dangerous construction and conditions of chimneys, fire places, hearths, stoves, stove pipes, ovens, boilers and apparatus used in and about any buildings and manufactories, and to cause the same to be removed or placed in a safe condition when considered dangerous; to regulate and prevent the carrying on of manufactories dangerous in causing and promoting fires; to prevent the deposit of ashes in unsafe places, and to cause all such buildings and enclosures as may be in a dangerous state to be put in safe condition." (301-2)

Sub-div. 66. "To regulate the police of the city or village and pass and enforce all necessary police ordinances." (302)

Sub-div. 78. "To do all acts, make all regulations which may be necessary or expedient for the promotion of health or the suppression of disease." (302)

Sub-div. 93. "To regulate and prohibit the keeping of any lumber yard and the placing or piling or selling any lumber, timber, wood or other combustible material *within the fire limits of the city.*" (303)—Ed.

are conclusive upon this question. What is there said is what is commonly called by lawyers, "*dictum*." The question involved in that case was the federal question as to whether or not the ordinance violated the constitution of the United States in its 14th amendment.

I will be frank to say that the very thing Mr. Calhoun stated in his closing remarks has been in my mind for hours; and that if it was within my power to bring back to life and put the bloom of youth and call life into the cheeks of these young girls, two of whom I personally knew, by incarcerating the defendant in this case in the penitentiary for the term of his natural life, I believe I would do it; but I cannot.

After ascertaining the precise question that was involved in this indictment,—or the questions rather,—(and it is not necessary to suggest that there are other questions which could not be properly raised upon this motion to suppress the introduction of the ordinances, such as the proximate cause of this death, whether or not there could be any legal violation here, by the mere violation of the city ordinance where there was no element of wilfulness or wantonness alleged, not questions that are properly brought within the objection made to the introduction of these ordinances as evidence), I have been confronted with this question of law. The people are denied the right of appeal. In no stage, from the finding of the indictment until the last act in the case has been performed, have the people any right to note an exception or pray an appeal. If the court rules here against the interest of the state, or the rights of the state, that is a finality. Our legislature has never seen fit to confer upon the people the right to take an appeal in a criminal case; and while I have always leaned to the idea it would be desirable to have such a statute that would at least enable the state to test the validity of its indictments, and to test all those questions which might properly be raised in arrest of judgment after a conviction, going to the sufficiency of the indictment, our people have been so jealous in guarding the liberty of the citizen, that they have never permitted the state to take an appeal in

any case. And the only way in which the state or the people can ever have any right to be heard in the supreme court of the state upon this question would be after there had been a trial, a conviction, a motion in arrest of judgment, that motion overruled, and the case taken to the supreme court by the defendant himself. In order to help the state to get such an opportunity, in order to get a judicial decision of the question involved here, this court, believing as I do that the law is as I have stated, would have to stultify himself, render a judgment contrary to his honest convictions as to what the law of the land is, let the case go to final judgment, overrule a motion in arrest of judgment, which I believe would be properly taken, and then allow the defendant to go on and show that I was wrong, as I knew I was wrong, or believed I was wrong, when I did it. Certainly I cannot be asked to so stultify myself and violate my oath.

The rule of construction is that when an offense is claimed to be a violation of a penal statute, that offense must be so plainly stated in the law that he who runs may read. Laws are made for the government of all the people. The man who works in the ditch as well as the trained lawyer and advocate are equally amenable to the law; and that law ought to be so expressed that every citizen may know his duty, and pursue it. And while I know that the decision I am making will be what is called unpopular in the great city of which we are so proud, within our borders, that much will be said in condemnation of it, the fact remains that under the law there is no legal liability, in my judgment, set forth in this indictment, or that can be set forth in any indictment framed upon this ordinance of the city of Chicago.

While it is outside of the record, it has been stated here and is perhaps an ascertained fact, known to us all, that the great city of Chicago itself has recognized the truth of this statement in the revision of its ordinances.

I read the opinion of Judge Green,¹ and he there expressed the same opinion that I had formed last week, before I saw

¹ *People v. Davis*, 1 Ill. C. C. 242.—Ed.

the ordinance, and had seen nothing except the opinion of Judge Kavanagh,¹ that in his judgment no indictment could be framed upon this ordinance which would be good.

Judge Landis, of the United States court, sitting in Chicago, as I understand it, has taken the same view,—that this ordinance does not point out any duty.² Judge Kohlsaat, I am also informed, has taken the same view of the question.³ And I agree with those Judges in the view which they take of this ordinance. And while it was contended in the splendid argument made by Mr. Buckingham that the rule of construction in the state of Rhode Island was different from the rule of construction which prevails in the state of Illinois, one of which he claims is strict, and the other is liberal no authority was produced in support of that statement, and it is my judgment and opinion and recollection that he is in error in that statement; that the rule of construction which prevails in the state of Rhode Island is practically the same as that which prevails in the state of Illinois; and that the interpretation put upon the act of the legislature of Rhode Island, which is more nearly analogous to the provisions of the ordinance which has been cited than any other act or ordinance which has been referred to in any of the books,⁴ is in harmony with the views I have expressed, and is the one which was followed by Judge Landis,⁵ Judge Kohlsaat⁶ and Judge Green.⁷

¹ *People v. Davis*, 1 Ill. C. C. 245.—Ed.

² *Hunter v. Iroquois Theatre Co.*, U. S. Cir. Ct. N. D. of Ill. unreported.—Ed.

³ See *McCulloch v. Ayer*, 96 Fed. 178; *Farley v. Speed*, U. S. Cir. Ct. N. D. of Ill. (Jan. 19, 1904) unreported.—Ed.

⁴ *Maker v. Slater Mill & Power Co.*, 15 R. I. 112, 23 Atl. 63 (1885); *Beehler v. Daniels*, 19 R. I. 49, 31 Atl. 52 (1895).—Ed.

⁵ *Hunter v. Iroquois Theatre Co.*, U. S. Cir. Ct. N. D. Ill. unreported.—Ed.

⁶ *McCulloch v. Ayer*, 96 Fed. 178; *Farley v. Speed* (Jan. 19, 1904) unreported.—Ed.

⁷ *People v. Davis*, 1 Ill. C. C. 242.—Ed.

Indeed, Judge Kavanagh, in his opinion,⁸ expressly states that not only those decisions, but the decision of the United States court, in the case relating to the census,⁹ and other cases in courts of high authority were contrary to the views which he expressed in his opinion overruling the motion to quash. The language of the statute which was read here on Wednesday afternoon, if I remember rightly, of the United States, made it the duty of the Census Bureau to obtain the information that was desired by the government with respect to corporations; but failed to specify what officer of the corporation should give the information that might be required by the census official. *U. S. v. Mitchell*, 58 Fed. 993. There one of the officers of the corporation had refused to give the information that was required, information that was deemed necessary by the government for the legislature,—that is, congress,—to have, in order that it might legislate for the general good, and he was indicted, and that indictment was quashed because the statute had failed to specify that it was the duty of the persons named or indicted to give the information required.

Of course, as I stated a moment ago, it would not be possible for me to review with any degree of accuracy all the decisions which have been rendered,—which have been read and offered for my consideration by both sides in this argument.

The other objections which have been urged with apparently more earnestness and sincerity than either of the two objections which I have taken to the ordinance, myself, may be good. I am inclined to agree, however, with the state that the objection which is made to the fire limits is not well taken.¹⁰ I am also inclined to agree with the state that the provision in the ordinance which conferred on the fire marshal, building commissioner and the board of underwriters of

⁸ *People v. Davis*, 1 Ill. C. C. 245.—Ed.

⁹ *U. S. v. Mitchell*, 58 Fed. 993 (1893).—Ed.

¹⁰ It was contended for the defendant that the ordinance prescribing the fire limits for Chicago did not prescribe limits that met, and that there was a gap in the territorial limits which under *Lamb v. City of Danville*, 221 Ill. 119, rendered the ordinance invalid.—Ed.

the city of Chicago, that power, is not void by reason of the fact that the board of underwriters was mentioned.¹¹

Upon the question first raised and argued by Mr. Mayer, and argued by Mr. Calhoun in the opening of his argument, i. e., with respect to the use of the word "large" there is cast upon this ordinance, to say the least, an element of doubt.¹² Outside of the confidence game case¹³ that was cited by Mr. Keeslar, I do not recall any case where the act complained of would amount to a felony where any court has held that language so general in its terms as the word "large" has been sustained, especially in a criminal proceeding. Those of us who are accustomed to the country and the country life and to examining country witnesses well know that in the vernacular of the people, the speech of the people, the term "ordinary gait" or "moderate gait" is a term which we all understand. I venture that nine out of ten of the witnesses who take the stand in the trial of civil cases where the question of the speed of a horse or of a rider is involved would state that he

¹¹ See upon this point the following cases: *Lasher v. People*, 183 Ill. 226; *People v. Election Commissioners*, 221 Ill. 9, 19; *Allardt v. People*, 197 Ill. 501, 510; *Johnstown Cemetery Ass'n v. Parker*, 59 N. Y. S. 821, 60 N. Y. S. 1015; *Shumway v. Bennett*, 29 Mich. 451.—Ed.

¹² It was contended that the ordinance was void for indefiniteness. The following cases were relied on: *City of Vincennes v. Spees*, 74 N. E. 277 (Ind.); *Wooley v. L. & S. R. Co.*, 93 Ky. 223; *Chicago, etc., R. R. Co. v. People*, 77 Ill. 443; *Pardridge v. O'Neill*, 25 Chicago Legal News, 76; *American Posting Service v. City of Chicago*, 35 Chicago Legal News, 35; *City of Chicago v. Gunning System*, 114 Ill. App. 377; *U. S. v. Brewer*, 139 U. S. 278, 288; *State v. West Side Street Ry. Co.*, 146 Mo. 155, 168; *Augustine v. State*, 52 S. W. (Texas) 77; *State v. New Orleans*, 22 S. R. 939 (La.); *McConvill v. Jersey City*, 39 N. J. DL. 38; *State v. Clark*, 69 Conn. 371; *Ex parte Bell*, 21 S. W. 1040 (Tex.); *City of Chicago v. Rumpf*, 45 Ill. 90, 98; *Tozer v. U. S.*, 52 Fed. 917; *U. S. v. Keokuk, etc., Bridge Co.*, 45 Fed. 178; *Louisville & Nashville Railroad Co. v. Commonwealth*, 99 Ky. 132; *Louisville & N. R. Co. v. Railroad Commission*, 19 Fed. 679; *U. S. v. Sharp*, Peters C. C. (118 Fed. Cas. No. 16,264); *Ex parte Andrew Jackson*, 45 Ark. 158; *L. & N. R. R. Co. v. R. R. Com.*, 19 Fed. 679, 681.—Ed.

¹³ *Maxwell v. People*, 158 Ill. 248.—Ed.

was going at a "moderate gait;" if it was a little more than that at a "right smart gait." We understand by that, I take it at least to be a gait anywhere from four to six miles an hour. Such ordinances have been sustained in Indiana.¹⁴ The policy ordinance which was referred to by Mr. Keeslar,¹⁵ while I am utterly ignorant of what the game of policy is, could not define it, could not give any person any idea as to what it is farther than it is a gambling game of some kind I take it is as well understood by those who belong to the gaming fraternity as the term "game of poker" or "game of euchre."

In every case nearly in which such ordinances have been sustained, there has been that evident difficulty of defining the offense charged. What constitutes disorderly conduct? Why, it is almost as varied as the various members of humanity themselves in a state of intoxication. No person can tell how to define the term "disorderly conduct" so as to cover every case that might arise.¹⁶ So it is with the confidence game, and in nearly every instance in which the books have sustained an ordinance or a statute where those general words and terms have been used, it will be found, I think, that the offense charged was one that was exceedingly difficult of definition. And in nearly every case—all that I recall, at least, except in the confidence game—for offenses that are analogous to our actions for debt and the violation of city ordinances. And while I am free to confess, while I consider the importance of this case, the hundreds and even thousands of homes that have been made desolate and unhappy—if that alone was the only question, I would be inclined to overrule this objection and admit the ordinance; but the fact that that ordinance does not impose a personal duty upon the defendant is a fact that I cannot get away from. It is not my own

¹⁴ *Nealis v. Hayward*, 48 Ind. 19.—Ed.

¹⁵ *State v. Carpenter*, 60 Conn. 97, 22 Atl. 497; *State v. Flynn*, 63 Conn. 148, 28 Atl. 28.—Ed.

¹⁶ Criminal Code Illinois, sec. 55, 56; *Noe v. People*, 39 Ill. 96, 97; *Washburn v. Bloomington*, 32 Ill. App. 245; *Poyer v. Desplaines*, 18 Ill. App. 225.—Ed.

individual judgment but it is the judgment of other courts save Judge Kavanagh alone, where that question has been presented and where nothing but mere dollars and cents were involved, as I understand the suits before Judge Kohlsaat and before Judge Landis, were simply suits for civil damages. Much more then where the punishment is the severest punishment that can be inflicted upon a rational, right-minded man. To any man possessed of the higher instincts of humanity, to any man who loves honor, to any man who loves the good-will and opinion of his fellow man, death is far preferable to imprisonment for life, even the torture of Torquemada, the inquisition with the thumb-screw and rack, all the torture and physical agony to which humanity may be put—death upon the gallows or death by shooting, or death in the chair, are all to be welcomed rather than to be incarcerated in a penitentiary for the term of your natural life where every visitor in the penitentiary can see your shame and your humiliation. Far better is the grave. And when I consider that the possible consequences of this punishment might extend to life and believing as I do believe that this ordinance is void in two respects—so far I mean as imposing any personal penalty upon Mr. Davis; because nowhere in it is the personal duty enjoined upon him to perform the things that are specified in the ordinance, even if it may be held that the ordinance covers the building in question; and because the city of Chicago has not the power to say that a theater in one part of the city does not need any equipment for the protection of human life and that a theater in another part of the city must be provided with those equipments for the protection of human life. Are those provisions in that ordinance for the purpose of preventing the spread of fire or a conflagration, are they part of the Fire Limits' Ordinance of the city of Chicago, or were they injected into that ordinance for the purpose of protecting and preserving human life? It does not seem to me that there can be any argument upon that question. They have been put into the ordinance for the purpose of affording protec-

tion for human life. Can it be said that human life is less sacred on Randolph street within the fire limits prescribed than it is on Clay street, so to speak, without the fire limits? May the 600 or 1,000 or 1,200 people who may live upon Clay street be incinerated and burned and the man in control of it who has been guilty of precisely the same neglect, who has been guilty of precisely the same moral turpitude, be free from punishment or censure and the other man be guilty of an offense that would imprison him in the penitentiary for the term of his natural life? Can that be the law in the state of Illinois? I cannot believe that it is. I know that it ought not to be the law that two men doing precisely the same thing and guilty precisely of the same acts in the same city, in the same community, that one of them should be a murderer in common acceptance and the other not guilty of even an offense worthy of a fine. The legislature certainly never intended, and they have not in express language, I think, at least, ever granted to the city council of the city of Chicago any such authority; and in assuming to regulate buildings, the manner of their construction, the materials of which they may be erected, outside of the one question of wooden buildings within the fire limits, those laws should be applicable to all of the people, subject them all to the same penalties, give them the same privileges and the same rights. This certainly is a government of equal rights, equal privileges, equal duties and equal liabilities. There ought not to be any distinction whereby one man may be imprisoned and another man go scot free for the doing of the same thing. If it is not class legislation, what is it?

And without attempting to go further in the discussion of this question, because I recognize the utter impolicy of it, however much I might like to review all of these decisions and how much I might desire to let the public understand the exact reasons and the precise authorities on which I base those reasons, it is evident to all of you that it is not possible within the time, having the jury here in imprisonment, for me to take the necessary time to review the decisions and cite the

authorities, and I shall content myself without any further comment upon it by sustaining the objection to the interjection of these ordinances.

Mr. Barbour: In view of the court's decision, we ask the privilege of nollying?

Mr. Mayer: No, we object. We understand that that cannot be done.

Mr. Mann: No, we ask the jury be brought in.

Mr. Mayer: I have no disposition to ask for any order that will not be in full compliance with the spirit and effect which your Honor's decision should have.

The Court: This question has arisen frequently in this court: It arose in the first case that it ever was my privilege to try, and I well remember that fact because it was my first criminal case, when the distinguished Judge Davis held that the party was entitled to a verdict if he demanded it—after the jury had been sworn he was entitled to a verdict.

Mr. Barbour: As I understand the rule, if the court please, it is different from your Honor's experience. The calling of the jury and the swearing of the jury—

The Court: I think the legal effect of it is the same. It is a question for the defendant himself to determine.

Mr. Buckingham: There is no question about the jeopardy.

The Court: There is no doubt about that in my mind.

Mr. Mann: Now, we are entitled to a verdict if the court please.

Mr. Mayer: The state's attorney of this county, your Honor, has very manfully and in a very honorable way agreed with us, and I address myself to the state's attorney of this county and his able assistant Mr. Buckingham.

Mr. Barbour: As far as I am concerned, I prefer to address myself to the court instead of anybody else.

Mr. Mann: He is the only one who is listening to you.

The Court: I hope, gentlemen, that none of the amenities that have prevailed in this case so far will be disturbed in any way.

Mr. Mann: No, there will be no fight.

Mr. Mayer: We ask that the jury be brought in and a verdict directed.

(The Court thereupon ordered that the jury be brought into court, and the jury returned to the court room, accompanied by the bailiff and the jurors resumed their seats in the jury-box.)

The Court: Gentlemen of the jury: Upon the conscience of this court must rest the responsibility of this case. Glad indeed would I have been if I could have shifted my responsibility upon your shoulders. During the last three days and a half the court has listened to a very able, learned and fair argument both by the representatives of the state and the representatives of the defendant as to the admissibility of the ordinances of the city of Chicago which are the foundation of this indictment. And after a careful consideration of those questions the court has decided that the ordinance did not impose any legal duty upon this defendant. The state will not introduce any further evidence and the law as stated to you by counsel upon your voir dire was that the presumption of the law was that every man is innocent until the contrary has been shown by the evidence. The state does not desire to offer any evidence before this jury, and under the law as given to you in your examination, it will be your duty to return a verdict of not guilty because there has been no evidence convincing you of guilt. What is your verdict, gentlemen? Is the verdict, guilty, or not guilty?

The Jurors: Not guilty.

The Court: The defendant will be discharged.

(Applause.)

The Court: That must be stopped instantly. This is a court of justice and the tribunal of the people, and no man has the right to censure or applaud its action unless for just cause.

(To the jury)

Gentlemen of the jury, you are discharged from any further consideration of the case.

(Superior Court of Cook County. In Chancery.)

**George F. Edmunds, John A. Kason, Stuyvesant Fish and
and William H. Emerich.**

vs.

**Illinois Central Railroad Co., Union Pacific Co., Railroad
Securities Co., et al.**

(February 20, 1908.)

1. **CORPORATIONS—STOCKHOLDERS' SUIT—NECESSITY OF PRIOR DEMAND UPON DIRECTORS.** Before a stockholder is entitled in his own name to institute and conduct a litigation which usually belongs to the corporation he should show to the satisfaction of the court that he called upon the directors to bring the suit and their neglect or refusal to comply with his request; or he must show that an application to them would have been futile, and therefore useless. Where the stockholder brings such an action the bill should contain an account of such demand and refusal, or should state facts and circumstances showing that such demand would have been an idle ceremony.
2. **BILL FOR INJUNCTION—STATEMENTS OF BILL MUST BE SUSTAINED BY FACTS.** The rule is that unless the statements of a bill for injunction are sustained by pleaded and proved facts they become the mere conclusions of the pleader, which need not be enforced by the decree of the court. This rule is strictly enforced where fraud or bad faith is charged.
3. **EQUITY ACTS ON FACTS, NOT ON FEARS.** Courts of equity act on facts alleged and proved, and not on fears, nor even on supposed prophecies.
4. **DIRECTORS OF CORPORATIONS ARE PRESUMED TO DO THEIR DUTY.** It is to be presumed, until the contrary affirmatively appears, that any man elected as a director of a corporation will do his duty; that he will not knowingly act either singly or in concert with his fellow directors, so as to impair the usefulness of his corporation, or to squander its property; nor to turn it over, bound hand and foot, to the control of another corporation.
5. **BILL TO ENJOIN VOTING OF STOCK AT A CORPORATE MEETING.** To sustain a bill to enjoin the voting of stock at a corporate meeting, it is not sufficient for the complainants to show merely that the act complained of is a public wrong; they must also show that by the doing of such act they will suffer a special injury to their civil or to their property rights.

6. **ELECTION OF DIRECTORS AT A CORPORATE MEETING WORKS NO LEGAL WRONG TO COMPLAINANTS; A MAJORITY OF STOCKHOLDERS IS ENTITLED TO ELECT A BOARD OF DIRECTORS.** This election of directors at a coming meeting can work no legal wrong to complainants, and no impending special injury to them or to any or to either of them is proved which calls for the interposition of this court. It is the clear right of a majority of the stockholders of a corporation to elect a board of directors that will carry out its wishes.
7. **CORPORATIONS—RIGHT TO VOTE STOCK IS INTEGRAL PART OF OWNERSHIP OF STOCK.** One who owns stock in a corporation has a right to vote such stock at any and every lawful meeting of the stockholders of the corporation. This right to vote is an integral and necessary part of ownership, and is as vital as is the right to receive the dividends lawfully declared upon such stocks. And at common law when the ownership of stock in a corporation has been legally acquired such ownership is not a qualified one, and if it is thus owned, whether by an individual or by a corporation, none of the rights attending ownership lie dormant or are incapable of being exercised.
8. **EVIDENCE—FINDINGS OF INTERSTATE COMMERCE COMMISSION NOT EVIDENCE IN STATE COURTS.** The findings and opinion of the Interstate Commerce Commission are not evidence in the state courts; such findings are prima facie evidence only in civil cases brought in the United States Circuit Court to enforce an award of damages.
9. **SHERMAN ACT—STATE COURTS HAVE NO POWER TO ENFORCE.** State courts have no power to enforce the Sherman act.
10. **CORPORATIONS—RIGHT OF ONE STOCKHOLDER TO ENJOIN ANOTHER STOCKHOLDER IN THE SAME CORPORATION FROM HOLDING OR VOTING STOCK.** If a person or corporation has no right to buy, hold or own stock in another corporation, then any bona fide stockholder, without alleging irreparable injury, may ask that the voting or holding of such stock be enjoined.
11. **CORPORATIONS—RIGHT OF ONE CORPORATION TO ACQUIRE STOCK IN ANOTHER.** The mere fact that a defendant is a corporation does not debar it from buying and holding the stock of other corporations or from enjoying all the rights and privileges which accompany such ownership.
12. **FOREIGN CORPORATIONS, RIGHT OF TO HOLD STOCK IN AN ILLINOIS CORPORATION.** The mere fact that a defendant which has invested in stock in an Illinois corporation is a foreign corporation does not debar it from holding such stock, for by the statutes of Illinois many classes of foreign corporations are expressly empowered to buy stock in domestic corporations.

13. RAILROAD CORPORATIONS—RIGHT TO INVEST IN STOCK OF OTHER RAILROADS. For a railroad company to invest its funds in the stocks of other corporations is not *malum in se*, and in the absence of an express statutory prohibition, or public policy to the contrary in the local jurisdiction of the corporation in whose stock it thus invests, it is not *malum prohibitum*.
14. CORPORATIONS—RIGHT OF ONE CORPORATION TO HOLD STOCK IN ANOTHER CORPORATION. There is not any general rule of American common law that one corporation cannot own stock in another corporation. The rule is that a corporation cannot become a stockholder in another corporation unless power to do so is specifically granted in its charter or is necessarily implied in it.
15. CORPORATION MAY HOLD STOCK IN ANOTHER CORPORATION WHEN EXPRESSLY AUTHORIZED. A corporation may take and hold stock in another corporation whenever it is expressly authorized to do so.
16. CORPORATIONS—STOCKHOLDING CORPORATION MAY BE FORMED UNDER THE LAWS OF ILLINOIS. A corporation may lawfully be formed under the laws of Illinois for the purpose of purchasing, owning and holding shares of capital stock in other corporations.
17. CORPORATION HAVING RIGHT UNDER ITS CHARTER TO OWN CAPITAL STOCK OF AN ILLINOIS RAILROAD CORPORATION HAS RIGHT TO VOTE SUCH STOCK, UNLESS RESTRAINED BY PUBLIC POLICY. The Union Pacific Railroad, under its charter and the laws of Utah, has a clear right to own and hold shares of stock of the Illinois Central which it purchased in 1906. By the laws of comity it had the right, which is an essential part of that ownership, to vote that stock at the meetings of the stockholders of the Illinois Central, unless such right is forbidden by the statutes of this state or by the public policy of this state. Such prohibition does not exist unless it affirmatively appears. It is not established by the mere lack of legislation upon that subject.
18. CORPORATION OWNING STOCK IN ANOTHER CORPORATION MAY VOTE SUCH STOCK IRRESPECTIVE OF ITS OWN STOCKHOLDERS. The right of the Railroad Securities Company to vote its stock in the Illinois Central Railroad stands uninfluenced and unimpaired by the fact that the Union Pacific Railroad owns all or practically all of the stock of the Railroad Securities Company. So long as it uses the voting power in a lawful manner and for lawful purposes it is immaterial who owns the stock.
19. PUBLIC POLICY OF A STATE IS FOUND IN STATUTES, DECISIONS OR PRACTICE OF GOVERNMENT OFFICIALS. The public policy of a

state is to be found in the statutes, and when they have not directly spoken, then in the decisions of the courts and in the constant practice of government officials. When the legislature speaks upon a subject upon which it has the constitutional power to legislate, public policy is what the statute passed by it indicates.

20. **PUBLIC POLICY OF ILLINOIS IS TO ENCOURAGE THE BUILDING AND MAINTENANCE OF RAILROADS.** The uniform public policy of the State of Illinois has been and still is to encourage the building and maintenance of railway lines for the transportation of goods and of passengers. The power to lease, to enter into operative contracts, to consolidate connecting lines, to buy and to sell, has been freely granted; but the public policy of the State is opposed to and forbids the union or consolidation of parallel or competing lines.
21. **PUBLIC POLICY OF STATE AS TO HOLDING OF STOCK BY CORPORATIONS NOT SHOWN BY ABSENCE OF LEGISLATION.** The public policy of this state as to the right of one corporation to hold stock in another cannot be established by the mere lack of legislation upon that subject. The prohibition does not exist unless it affirmatively appears.
22. **FOREIGN CORPORATIONS IN ILLINOIS ARE PLACED UPON EQUAL FOOTING WITH DOMESTIC CORPORATIONS.** There is in the law of this state no discrimination against foreign corporations, but they are given a hospitable reception and are placed upon an equal footing with our domestic corporations.
23. **PUBLIC POLICY OF ILLINOIS RECOGNIZES THE RIGHT OF A FOREIGN OR DOMESTIC CORPORATION TO INVEST ITS SURPLUS FUNDS IN THE STOCK OF ANOTHER CORPORATION.** There is no public policy in this state forbidding a corporation either domestic or foreign (foreign railroad companies not now being considered) from investing its surplus funds in the stock of another corporation. On the contrary such power is recognized or expressly granted in the acts cited. It is only when such investment is made for an unlawful purpose, such as to prevent competition, or to create a monopoly that the law forbids the same. Whether the power exists in any corporation to buy and hold the stock of another company depends on the charter of the purchasing company and on the law under which it is created. Given that power there is no statute in this state which forbids its exercise.
24. **FOREIGN CORPORATION ACT OF ILLINOIS OF 1905 NOT RETROACTIVE IN EFFECT.** The Illinois foreign corporation act of 1905 was intended to take effect upon causes of action and demands arising after its passage, and upon none other. Statutes are

prospective, and will not be construed to have a retroactive operation unless the language employed is so clear that it will admit of no other construction. Retrospective laws are not looked on with favor.

25. **TITLE AND RIGHTS OF CORPORATION NOT AFFECTED BY LACK OF POWER OF ITS STOCKHOLDERS TO EXERCISE SUCH RIGHTS.** The title of a corporation to its property and the enjoyment of all the rights going with and making up that title cannot be taken away by showing that any or all of its stockholders had no power to exercise such rights.
26. **CORPORATION—LACK OF POWER TO HOLD STOCK NOT AFFECTED BY THE MANNER OF ITS PURCHASE.** If a corporation purchasing stock has no power to buy, hold and enjoy the stock it purchases, then whether it buy stock in its own name or through the intervention of individuals or trustees the want of power is the same.
27. **CORPORATIONS—PURCHASE OF STOCK OF OTHER CORPORATIONS NOT MALUM IN SE UNDER LAW OF ILLINOIS.** The buying by one corporation of stock of another corporation is not *malum in se*. It does not come within any of the exceptions named in the Illinois Corporation act. The legislature of this state, in a series of acts extending over many years, has granted to fire insurance companies, to life insurance companies, to mining and manufacturing companies, to gas companies, to accident insurance companies, to trust companies, and to railroad companies the power to buy, own, hold and enjoy stock of other corporations. If the granting of this power is unlawful in this state, these acts would not have been passed, or, if passed, would have been condemned by the courts.
28. **RAILROAD CORPORATIONS—LEGALITY OF STOCKHOLDINGS IN TWO COMPETING RAILROAD CORPORATIONS; TENDENCY TO MONOPOLY TEST OF LEGALITY.** A railroad corporation can lawfully hold stock in two roads which are competitors of each other; such holdings do not become illegal until the amount thereof is great enough that by its necessary operation it tends to restrain trade or to create a monopoly and to deprive the public of the advantages that flow from free competition.
29. **PRELIMINARY INJUNCTION—OFFICE OF, TO PRESERVE THE STATU QUO.** The usual office of a preliminary injunction is to continue the statu quo until the final hearing. Upon the determination of this question, unless the right of the complainants to have the injunction retained is clear, the balance of convenience and inconvenience to the parties litigant has a potent influence.
30. **INJUNCTION TO RESTRAIN VOTING OF STOCK AT CORPORATE MEETING.** Complainants, stockholders in the Illinois Central Rail-

road filed a bill for an injunction to restrain the Union Pacific Railroad Company and the Railroad Securities Company, and certain individuals from voting stock owned by them in the Illinois Central Railroad at its annual meeting. A temporary injunctional order was granted. Upon motion to dissolve the injunction *held* that the stockholders were proper parties complainant, that the Union Pacific Railroad and The Railroad Securities Company have full ownership of the shares of stock they claimed to own in the Illinois Central Railroad, including the right to vote that stock at the stockholders' meeting; that such right to vote is not forbidden by the statutes of this state nor by the decisions of the supreme court nor by the public policy of Illinois; and that the motion to dissolve the injunction should be allowed.

General No. 263,420. Motion to dissolve injunction restraining defendants from voting stock of the Illinois Central Railroad at the annual stockholders' meeting. Heard before Judge Farlin Q. Ball. Opinion rendered Feb. 20, 1908.

STATEMENT OF PLEADINGS AND FACTS BY COURT.

The bill, filed October 14th, 1907, states:

The names of complainants, and the number of shares of Illinois Central stock owned by each; and

The creation of Illinois Central Railroad Company by special act of the legislature of the state of Illinois, dated February 10th, 1851.

That the Illinois Central owns and operates about 4,459 miles of road in Illinois and in ten other states, and its outstanding capital stock consists of 950,040 shares of the par value of \$100 each; and

Names the president and directors of the company.

That the terms of office of directors Hackstaff, Fish, Astor and Harriman expired October 16th, 1907, and a meeting of the stockholders is called to fill such vacancies at Chicago, Illinois, on October 16, 1907.

That the Union Pacific Railroad Company is a corporation of Utah, and owns and controls about 5,588 miles of road in

Utah and in nine other states, and connects with the Illinois Central at Omaha and through the Southern Pacific, which it dominates at New Orleans.

That Edward H. Harriman is a director in the Illinois Central, and is also a director in and president of the Union Pacific, and chairman of the executive committee; and Goelet and Peabody are also directors of the Union Pacific.

That Harriman "by some means unknown to your orators completely dominates and influences" all of the Union Pacific directors, and all of the Illinois Central directors except four; and the directors so dominated "move and act, speak and vote merely to register his will" in all matters concerning both companies.

That under the guidance of Harriman the Union Pacific has been attempting to get control of the Illinois Central in order that it may be operated as a mere feeder for the Union Pacific and not for its own benefit, to the great damage of the Illinois Central and its stockholders;

That this design began to show itself in 1906, when Harriman at the stockholders' meeting, held October 17 of that year, attempted to elect DeForest, then a director of the Southern Pacific, as a director of the Illinois Central; Fish defeated the election of DeForest; and because of this Harriman deposed Fish from the presidency of the Illinois Central, and elected Harahan, who, as president of the Illinois Central, is completely under the control of Harriman.

That in 1906 the Union Pacific purchased 195,000 shares of the stock of the Illinois Central; and also purchased nearly all the stock (Fish selling to Harriman 6,625 shares of the common stock and 11,925 of the preferred stock) of the Railroad Securities Company of New Jersey; using in this last purchase 8,769 shares of the Illinois Central stock, thus reducing the holdings of the Union Pacific in the Illinois Central to 186,231 shares; and

Harriman, Peabody and Goelet kept such proceedings secret until they were revealed in January, 1907, in an investigation

made by the Interstate Commerce Commission, as appears by the report of that body, which report is made a part of the bill.

That in purchasing the Securities Company stock the Union Pacific violated its charter and the laws of Utah, and such ownership is *ultra vires*, and null and void;

That the acquisition of 29.6 per cent. of the Illinois Central stock by the Union Pacific is part of an unlawful scheme in violation of the laws of the United States and of the state of Illinois to control all interstate and foreign commerce of the United States and to eliminate all competition among common carriers by land and by sea; which control the Union Pacific seeks to get by purchases of large blocks of stock in the principal transportation corporations; (then follows the names of the corporations, some of which are competitors of the Illinois Central, in which the Union Pacific has purchased stock, and a report of the Inter-State Commerce Commission setting forth such ownership in detail is made a part of the bill;) and the ownership and control by the Union Pacific of the stock of these competing and parallel lines is *ultra vires*, and the Union Pacific has no right to vote the stock of the Illinois Central for any purpose;

That the Union Pacific by its large holdings of Illinois Central stock practically controls the elections of that company; and the Union Pacific has not had transferred to itself upon the books of the Illinois Central any of the 186,231 shares of the Illinois Central stock it so purchased, but has kept such stock in the names of interposed persons who hold the same for the Union Pacific, (these persons are named); and it is declared that such holdings are void in law;

That the Railroad Securities Company is a New Jersey corporation with power by the second article of its charter to purchase, own and hold shares of capital stock in railway companies, including the right to vote thereon; prior to September 18, 1907, said company held 95,000 shares of the capital stock of the Illinois Central, its only assets except cash, and on that day 15,000 shares were transferred to E. H. Har-

riman and others (who are named); these transfers were made so as to permit such persons to vote at the then coming annual meeting of the Illinois Central, and such transfers are void in law.

Refers to the Mutual Life Insurance Company, (which has been dismissed out of the case).

That the Union Pacific and the Securities Company have not nor has either of them any right to own or hold or vote stock of the Illinois Central, either in their own names or in the names of the interposed persons.

That complainants made no application to the Illinois Central to bring this suit, because, first, they are advised that they have such right as individual stockholders; second, it would have been an idle ceremony to have made such application; (a) eight of the thirteen directors of the Illinois Central believe and hold that the Union Pacific and the Securities Company have and each of them has a legal and moral right to vote the stock they severally hold, and that to bring such a suit would injure the Illinois Central and other large business interests; (b) Directors Harriman, Goelet and Peabody are also directors in the Union Pacific, and have participated in the unlawful schemes set forth in the bill, and would not have permitted the suit to be brought, and five other of the directors, Astor, Hackstaff, Harahan, Vanderbilt and Auchincloss would have been advised by Harriman to vote against bringing suit and would have followed such advice; (c) eight of said directors are personally hostile to Mr. Fish, and therefore would have voted against the bringing of the suit, and also because they feared that if the Union Pacific and the Securities Company were not permitted to vote, Fish would cause himself to be elected, and they to be defeated for re-election when their terms expired.

That it is the intention of the Union Pacific and of the Securities Company to vote all of said stock in pursuance of the design of the Union Pacific to dominate the Illinois Central, and to control and dominate inter-state, intrastate and foreign commerce of the United States, and to eliminate all

competition among common carriers, and to these ends they will vote at the coming meeting to re-elect as directors, Harriman, Astor and Hackstaff, who are under the domination and control of Harriman and for some fourth person to be selected by Harriman; and said stock will be voted at subsequent elections so as to eliminate all not under the influence of the Union Pacific, whereby the Union Pacific will succeed *pro tanto* in carrying its illegal purpose into effect, contrary to the laws and public policy of this state and to the great and irreparable damage and injury of complainants; and it is the intention of the officers of the Illinois Central to permit such stock to be so illegally voted, and complainants have no remedy except in a court of equity.

Prays that an injunction issue preventing the defendants, who are named, from permitting the Union Pacific and the Securities Company to vote said stock whether held in the names of said companies or in the names of interposed persons, at the coming annual meeting or any adjournment thereof; and that the Union Pacific and the Securities Company and each of them refrain from voting such stock; that the injunction be made perpetual; that it may be decreed that neither the Union Pacific nor the Securities Company has any right to vote any stock it may own of the Illinois Central at any meeting of the stockholders of the latter company; that said stock held by others for the Union Pacific and for the Securities Company may be decreed to belong to said companies respectively, and that their purchases of said stock be declared null and void, and said companies be ordered to sell the same; prayer for process; and general prayer for relief.

The bill was verified by Mr. Fish. He also made an affidavit alleging that as the defendants were non-residents and the date of the annual meeting of the stockholders of the Illinois Central was but two days away, it was impossible to give personal notice to them.

Upon the filing of a bond in the sum of \$10,000, a preliminary injunction, as prayed for in the bill, was issued.

The next day the parties came before the court, and as the time intervening between then and the date of the annual meeting was not sufficient for a proper discussion and decision of the questions involved in the motion then made to dissolve the injunction, by agreement of the parties, an order was entered, providing that the meeting should go on, but if at such meeting it appeared that the counting of the votes of the enjoined stock would make a difference in the result of the election, then the stockholders' meeting should be adjourned to December 18th, 1907.

During the progress of the meeting it did appear that the votes of the enjoined stock were necessary to an election, and thereupon the meeting was adjourned to December 18th, 1907.

When that day came counsel were in argument upon a motion to dissolve the injunction, and for that reason the meeting was postponed to March 2nd, 1908.

The Union Pacific filed its answer to the bill, in which it admits the preliminary averments of the bill; states that the lines of the Illinois Central are connecting lines, and are not parallel or competing with any of the lines of the Union Pacific or of the Southern Pacific. Denies all domination by Harriman, as averred in the bill, or that it is attempting to get control for its own purposes of the Illinois Central.

Asserts that by the terms of its charter it has power to buy and hold stock in the Illinois Central, and such purchases are not in violation of law; that it is in position to give much of its Eastern tonnage to the Illinois Central or send it over rival lines; that Fish recommended the construction of the line which connects the Illinois Central with defendant's road.

Admits the purchase by it in 1906 of 186,231 shares of the stock of the Illinois Central, which it yet holds as beneficial owner, the stock standing in the names of firms and individuals mentioned in the bill; denies that such stock was put in those names for the purpose of concealment, but says the stock so stood when it was bought, and it was so left, as is the

many years owned and voted stock in the Illinois Central and have known and acquiesced and ratified the right of the Securities Company to vote, and are thereby estopped; Emrich bought his five shares of stock from persons who had approved the ownership of its stock by the Securities Company, and he is thereby estopped; and Harahan states he will vote for such persons as in his judgment are best qualified to serve the best interests of the Illinois Central.

The answer of the Railroad Securities Company among other things—

Avers that it is an investment company, organized under the laws of New Jersey, and its powers as a corporation are correctly set forth in the bill of complaint and its charter, therein referred to; that in 1900 it bought of Fish and his associates about 80,000 shares of the capital stock of the Illinois Central, and for the stock then sold to it by Fish it paid him \$2,650,000, and all of such stock was forthwith registered upon the stock books of the Illinois Central in the name of this defendant, and ever since it has been the registered owner and holder of many thousands of shares of the Illinois Central stock, and has, with the knowledge and acquiescence of all other stockholders, exercised all the rights of ownership; in March, 1901, it purchased and paid for 7,747 other shares of such stock; in December, 1901, it purchased and paid for 16,000 other shares of said stock; in December, 1902, it purchased and paid for 19,200 other shares of such stock, and at each annual meeting it has voted its registered stock through Fish as its proxy.

(The answer then repeats the statements made in the answer of the Union Pacific as to the candidacy of Fish and his efforts in that regard.)

That Fish, from 1900 to November 12, 1906, owned about one-third of the stock of the defendant company, and was a director thereof from 1901 to December, 1906, and also its vice-president from 1902 to December, 1906.

Sets up the deposit of 80,000 shares of its Illinois Central stock with the United States Trust Company, the issue of the

same amount of Illinois Central Stock Interest Certificates, which have been widely sold, and all now in the hands of numerous investors in reliance upon the right of this defendant to own and to vote such stock; the complainants or the previous owners of the shares of stock now held by them, knew all these things, as did the Illinois Central and all its stockholders; therefore complainants have acquiesced in and ratified the right of this defendant to own and vote its said stock, and are estopped to deny the same;

Avers that it proposes to vote its said stock at the coming meeting against Fish and for the re-election of Astor, Harriman and Hackstaff as directors of the Illinois Central, and for a fourth man who shall be honest, independent and not connected with the Union Pacific, and

Avers its right to vote the said stock is an important element in the ownership thereof; it is a property right; and its right of ownership and of voting is not in contravention of any law of this state.

The answer of Illinois Central Railroad Company, among other things, denies that Edward H. Harriman completely dominates and influences any of the directors of that company and denies that any of said directors is so under the influence of Mr. Harriman that he moves, acts, speaks and votes merely to register his will in all matters concerning said Union Pacific Railroad Company and said Illinois Central Railroad Company. It avers that in no transaction of any kind between said two companies has any director of the Illinois Central Railroad Company voted prejudicially to its interest; that there have been no contracts or dealings brought, within the last two years, before said board for action, that the only dealings between said two companies have been agreements for connecting their tracks and the use of the station of the Union Pacific Railroad Company at Omaha, both of which were negotiated and recommended by Mr. Fish, and for interchange of traffic and division of rates, and that in respect of these, no change has been made or proposed within the last year. It denies that a stockholder owning and

controlling the proportion of the capital stock alleged to be owned and controlled by the Union Pacific Railroad Company can entirely control a stockholders' meeting of the Illinois Central Railroad Company, because such a holding is a minority and could be completely paralyzed by the outstanding majority. In respect to the allegations of section 19A, the answer admits that complainants made no application to the board of directors of the Illinois Central Railroad to bring the suit. It denies that is a sufficient excuse for not making such application. The answer avers that the suit is one which concerns all of the stockholders as a body, and that the company, as representing all the stockholders, could have brought such a suit in its own name. It denies that it would have been an idle ceremony to have made such application. It denies that a majority of said board believed, held and maintained when said suit was brought, and that they had been advised that said Union Pacific Railroad Company and said Railroad Securities Company had each a moral or legal right to hold and vote all or any part of said stock, and that therefore they would have regarded the bringing of such suit as a groundless and vexatious action, and that they had been advised, informed and believed that the bringing of such a suit would injure large interests throughout the country, and corporations in which they were stockholders, bondholders or directors, or that it would injure the Illinois Central Railroad Company. It avers that no such question arose in any way or was presented for consideration, before this suit was brought, and that the bringing of the suit was a surprise to said directors, and for the first time presented to their minds the questions involved in it, and that they had, when this suit was brought, been given no advice upon the subject, had not considered it, and had formed no opinion or judgment as to the propriety or right of bringing it, or what effect the bringing of such a suit would have upon their interests, or those of the Illinois Central Railroad Company. It does not admit that the fact that Messrs. Harriman, Peabody and Goelet are directors and stockholders in the Union

Pacific Railroad Company would preclude them from forming a just opinion and acting justly upon a question of that character, if properly presented to them in their capacity of Directors of the Illinois Central Railroad Company. It denies that Messrs. Astor, Hackstaff, Harahan, Vanderbilt and Auchincloss would not have voted for any resolution to bring such suit if earnestly advised, solicited and directed by said Harriman not to do so, and says they would have voted in the negative only if it appeared from the facts presented to the board that it would not have been for the interests of the Illinois Central Railroad Company to have such suit brought. It denies that any or all of said directors of the Illinois Central Railroad Company are intellectually or otherwise absolutely under the influence, control and domination of said Harriman, and that they have always followed his advice, opinion, suggestion and direction in all matters which come for consideration before said Board of Directors of the Illinois Central Railroad Company. It avers that said Harriman never at any time advised, solicited or directed said directors, or any of them, against the bringing of any such suit. It then shows the length of the respective terms of office and the number of shares of stock held by Directors Astor, Hackstaff, Harahan, Vanderbilt, Auchincloss and Harriman. It denies that there is such personal hostility of eight of the directors of the Illinois Central Railroad Company toward Mr. Fish as would have made them vote against any resolution or direction to bring this suit, or any suit having a similar object. It avers that much of the hostility now existing between said directors and said complainant has been engendered by this suit and the charges made in it by said complainant against said directors. It avers that there is no hostility on the part of said directors toward any of the other complainants and that there was not and now is not any such hostility to complainant Fish as would make them disregard their duty as directors upon any matters properly presented for their consideration, even though proposed by said complainant. It avers that no such question as voting said stock,

or such plan of said complainant Fish to exclude the voting of same at the instant and succeeding stockholders' meetings and thereby control and vote the majority of the stock so as to oust said directors, arose prior to the filing of this suit, and that no such consideration was apparent when the directors should have been applied to to bring suit, and avers that the allegations in said paragraph show no sufficient reason for not applying to the board of directors of the company to authorize the bringing of this suit. It denies that irreparable injury can or will come to the Illinois Central Railroad Company, or its stockholders, from re-electing said directors, Harriman, Astor and Hackstaff. It points out that the bill does not show that any action is about to be taken, or that any is imminent or contemplated, of any character affecting its relations with the Union Pacific Railroad Company, and that no irreparable injury is in any manner shown, and avers that if at any time the directors of the Illinois Central Railroad Company should take or be about to take any action which would be prejudicial to the interests of said company, the courts can enjoin or nullify such action.

Affidavits of defendants Astor, Hackstaff, Harahan, Vanderbilt and Auchincloss show:

1. Each denies that he is dominated by Harriman.
2. Each says that in no transaction between the Union Pacific and the Illinois Central has he voted against the interests of the latter company. That within two years no contract between the two companies has been brought before the board of directors of the Illinois Central; and the only dealings between them have related to track connections and station privileges, both of which were negotiated and recommended by Fish; and that as to traffic and rates no change has been made or proposed within the last year.
3. Denies that an application to the company to bring this suit would have been an idle ceremony. (Then follows, substantially in the language of the answer of the Illinois Central, a detailed denial of the charges in that behalf contained in the bill.)

4. Each states the time he has been a director or officer of the Illinois Central, and the number of shares of stock he holds.

5. Denies that he has any hostility towards Fish or any of the other complainants that would have made him disregard his duty to the Illinois Central.

6. Says that no question as to voting this stock or to exclude the same arose prior to the filing of this suit.

7. Denies that any irreparable injury can or will come from his re-election as a director of the company.

Affidavits of Harriman, Goelet and Peabody show:

Goelet and Peabody deny that they are dominated by Harriman. Harriman denies that he dominates or influences any of the directors of the Illinois Central as charged.

Repeats paragraphs 2 and 3 of the Astor *et al.* affidavit.

Each says the fact that he is a director of the Union Pacific does not preclude him from acting justly towards the Illinois Central.

Goelet and Peabody each denies that he is under the influence of Harriman, or that he has acted in any manner than in accordance with his own judgment.

Harriman denies that he ever advised any director of the Illinois Central to vote against the bringing of any such suit.

Repeats paragraphs 5, 6 and 7 of the Astor *et al.* affidavit.

Affidavit of Walter Luttgen substantially repeats paragraphs 1, 3 and 6 of the Astor *et al.* affidavit.

For reasons given in the opinion filed herein the report of the interstate commerce commission is not abstracted. Other affidavits were filed by the contending parties as to what occurred between them from the summer of 1906 down to the close of the argument; but as they are not vital to the present motion, they are not abstracted.

Mr. Fish files an affidavit stating that when he voted the Securities Company stock he always believed he had a legal right to so vote until advised to the contrary in September, 1907. Mr. Emrich by affidavit shows that the Union Pacific now owns all of the stock of the Securities Company, except 45.2 shares.

BRIEF OF COMPLAINANTS.

Henry W. Leman, Edgar F. Farrar and Frank H. Culver,
attorneys for complainants.

I.

As the Union Pacific Railroad Company owns and controls every share of stock in the Railroad Securities Company, the latter disappears as a factor in this case, and if the Union Pacific Company, on grounds of public policy, cannot directly hold or vote stock in the Illinois Central Company, it cannot do so indirectly through a holding corporation of which it is the sole stockholder. *Morris v. Pugh*, 3 Burr. 1243; *Morawetz on Private Corporations* (2nd Ed.) 1; *State v. Standard Oil Co.*, 49 Ohio St. 137; *People v. North River Sugar Refining Co.*, 121 N. Y. 582; *United States v. Milwaukee Refrigerator Transit Co.*, 142 Fed. 247, 252; *Southern Electric Securities Co. v. State*, 44 South. 785; *Ford v. Chicago Milk Shippers' Asso.*, 155 Ill. 166; *Stockton v. Central R. R. Co.*, 50 N. J. Eq. 52; *Central R. R. Co. v. Penn. Co.*, 31 N. J. Eq. 475.

(a) Where a corporation cannot hold and vote stock in another company in its own name, it cannot do so in the name of interposed persons. *Clark v. Central R. R. of Ga.*, 50 Fed. 338; *Great Eastern Ry. v. Turner*, L. R. 8 Ch. 149; *Central R. R. Co. v. Pa. R. R. Co.*, 31 N. J. Eq. 475; *Marble Co. v. Harvey*, 92 Tenn. 115; *Mack v. DeBardeleben*, 90 Ala. 396; *Campbell v. Poultney*, 6 Gill. & J. 94; *State v. Hunton*, 28 Vt. 594; *Martin v. Ohio Stove Co.*, 78 Ill. App. 105; *Union Traction Co. v. Chicago*, 199 Ill. 629; *Buie v. Chicago, etc., R. Co.*, 55 L. R. A. 861.

II

Under the law and public policy of the State of Illinois the Union Pacific Railroad Company is without power to hold and vote stock in the Illinois Central Railroad Company.

1. The general rule of the American common law that one corporation cannot own stock in another corporation prevails in Illinois. Departures from that rule are permitted in

specific cases by specific statutes, but these departures confirm and do not overthrow the rule. *People v. Pullman Car Co.*, 175 Ill. 159; *People v. Chicago Gas Trust Co.*, 130 Ill. 268, 286; *McCoy v. World's Columbian Exposition*, 87 Ill App. 605, 607, 186 Ill. 356, 360; *Martin v. Ohio Stove Co.*, 78 Ill. App. 105, 108; Veto Message of Governor Fifer of Illinois to bill allowing certain corporations to hold stock in railroad companies, 1891.

The prevailing doctrine in America is that one corporation cannot become a stockholder in another corporation unless power to do so is specifically granted in its charter or necessarily implied from it. *Hafer v. N. Y. L. E. & W. Ry.*, 14 Weekly Law Bul. 68; *Milbank v. New York, etc., Ry. Co.*, 64 How. Pr. 20; *Parsons v. Tacoma, etc., Ry. Co.*, 25 Wash. 492; *Pearson v. Concord R. R. Co.*, 62 N. H. 537; *Central R. R. v. Collins*, 40 Ga. 582; *Hazelhurst v. Savannah Ry. Co.*, 43 Ga. 13; *Central R. R. of N. J. v. Pa. R. R.*, 31 N. J. Eq. 475; *Elkins v. Camden, etc., R. R.*, 36 N. J. Eq. 5; *Deny Hotel Co. v. Schram*, 6 Wash. 134; *McGinnis v. Mining Co.*, 75 Pac. 89; *Railway Co. v. Iron Co.*, 46 Ohio St. 44; *Easen v. Buckeye Brewing Co.*, 51 Fed. 156; *Franklin Bank v. Commercial Bank*, 36 Ohio St. 350; *Sumner v. Marcy*, 3 Woodbury & Minot, 105; *N. O. S. S. Co. v. Ocean Dry Dock Co.*, 26 La. Ann. 175; *State v. Newman*, 51 La. Ann. 833; *Lester v. Bemis Lumber Co.*, 74 S. W. 518; *McCampbell v. Fountain Head R. R.*, 77 S. W. 1070; *Franklin v. Lewiston Inst.*, 68 Me. 43; *Marbury v. Ky. Union Land Co.*, 62 Fed. 335; *Marble Co. v. Harvey*, 92 Tenn. 115; *DeLavernne Co. v. German Savings Inst.*, 175 U. S. 40; *Central Transportation Co. v. Pullman Co.*, 139 U. S. 24; *California Bank v. Kennedy*, 167 U. S. 362, 367; *First National Bank of Converse*, 200 U. S. 425, 429; *Coler v. Tacoma Ry. & Power Co.*, 65 N. J. Eq. 351; Cook on Corporations (5th Ed.) p. 679; Green's Brice's Ultra Vires, p. 95; 1 Yale Law Journal ("Voting Trusts"); *First Nat'l Bank v. Nat'l Exchange Bank*, 92 U. S. 122, 128; Wood on Railroads, sec. 174; *Thomas v. R. R. Co.*, 101 U. S. 83; *Oregon Ry. v. Oregonian Ry.*, 130 U. S. 22; *Am. Loan & Tr. Co. v. M. & N. Co.*, 157 Ill. 641.

2. The law and public policy of Illinois prohibit one railroad company from owning stock in another corporation. To this rule there are two strictly limited exceptions. Sec. 13, General Railroad Incorporation Act of Ills. Nov. 5, 1849; sec. 14, General Railroad Incorporation Act of Ills. 1872; Amendment of 1891 to sec. 14, R. R. Inc. Act of 1872; Act of Jan. 1, 1875 (Union Depot Corporations) Hurd's 1906 Stat. 1575.

(a) From 1854 to 1874 the public policy of Illinois was to permit the consolidation of foreign and domestic connecting lines. Act of Feb. 28, 1854, specifically repealed by specification No. 237 of Act of Mch. 31, 1874; *Am. Loan & Trust Co. v. M. & N. Co.*, 157 Ill. 641; Ratificatory Act of June 4, 1897, Hurd's 1906 Stat. p. 1607; Act of May 27, 1907 (Laws 1907) p. 473; Act June 14, 1883 (Laws 1883 p. 124) Hurd's 1906 Stat. pp. 1573, 1606, 1611; *L. & N. Ry. v. Kentucky*, 161 U. S. 684; *Mackintosh v. Flint & P. M. Ry. Co.*, 34 Fed. 614; *Elkins v. Camden & A. Ry.*, 36 N. J. Eq. 12; *Hafer v. N. Y., L. E., etc., Ry. Co.*, 14 Wkly. Law Bul. 66.

3. The Union Pacific Railroad Company as a foreign corporation, has no greater rights in Illinois to own stock in an Illinois Railroad Company than a domestic railroad company of that state would have. *Carroll v. City of East St. Louis*, 67 Ill. 571, 577, 578; *Bank of Augusta v. Earle*, 13 Pet. 519; *Runyan v. Coster*, 14 Pet. 122; *Hazelton Boiler Co. v. Tripod Boiler Co.*, 142 Ill. 505; *Harding v. Am. Glucose Co.*, 182 Ill. 551, 616; *Stevens v. Pratt*, 101 Ill. 217; sec. 26, General Incorporation Act of Illinois, Hurd's Rev. Stat. 1906, p. 501; *Barnes v. Suddard*, 117 Ill. 237; *Pennsylvania Co. v. Bauerle*, 143 Ill. 459; *Granite Asso. v. Lloyd*, 145 Ill. 620; *People v. Van Cleave*, 187 Ill. 125; Illinois Foreign Corporation Act of 1905; *Matter of Bronson*, 150 N. Y. 1; *Southern Electric Co. v. State*, 41 So. 791; *Female Academy v. Sullivan*, 116 Ill. 382, 384; *Farmers' Loan & Trust Co. v. Elevated R. R. Co.*, 173 Ill. 439; *People v. Van Cleave*, 187 Ill. 125; *North Am. Ins. Co. v. Yates*, 214 Ill. 272; *Franklin Life Ins. Co. v. People*, 200 Ill. 619; *Hannibal & St. J. R. Co. v. Crane*, 102 Ill. 249; *Mead v. Davies*, 84 Ill. App. 558; *Parsons v. Tacoma Smelting & Refining Co.*, 25 Wash. 492; *Coler v. Tacoma Ry.*

& *Power Co.*; 64 N. J. Eq. 131, reversed in 65 N. J. Eq. 347, 351; *People v. Chicago Gas Trust*, 130 Ill. 294.

(a) Negligence in enforcing the statute by government officers is no defense to this suit. *Northern Securities Case*, 193 U. S. 279.

4. It is against the public policy of the State of Illinois for one railroad company to hold stock at the same time in parallel and competing lines within its limits, and hence under the conceded facts of this case the attempt of the Union Pacific Company to acquire stock in the Illinois Central Company was *ultra vires* and void by the law of Illinois.

All combinations, trusts or monopolies are prohibited by the laws and decisions of Illinois. Hurd's Statutes Ch. 38, sec. 269; *Harding v. American Glucose Co.*, 182 Ill. 551; *People v. Chicago Gas Trust Co.*, 130 Ill. 268; *Martin v. Ohio Stove Co.*, 78 Ill. App. 105.

All purchases, consolidations or leases of parallel and competing lines of railroad are specially prohibited. Constitution, art. XI, sec. 11; Hurd's Statutes, sec. 57, ch. 32, p. 509; sec. 23, ch. 114, p. 1569; sec. 39, ch. 114, p. 1572; secs. 42 and 47, ch. 114, p. 1573; secs. 196 and 197, ch. 114, pp. 1606-7; sec. 218, ch. 114, pp. 1611-12; *Northern Securities Co. v. United States*, 193 U. S. 197, 275, 332; *Chicago, etc., Coal Co. v. People*, 114 Ill. App. 75; *Dunbar v. American Tel. Co.*, 224 Ill. 9; *Bigelow v. Calumet & Hecla Co.*, 155 Fed. 869; *Central Ohio Salt Co. v. Guthrie*, 35 Ohio St. 672; *L. & N. R. Co. v. Kentucky*, 161 U. S. 698; *Interstate Commerce Com'n v. Harriman*, 157 Fed. — (Jan. 15, 1908).

5. The Union Pacific Railroad Company has no right to hold and own stock of the Illinois Central Railroad Company as part of an unlawful scheme to suppress competition in violation of the anti-trust laws of the United States. *Northern Securities Co. v. United States*, 193 U. S. 197; *Bigelow v. Calumet & Hecla Co.*, 155 Fed. 869.

III.

The Railroad Securities Company has no power to own or vote stock in the Illinois Central Railroad Company. *Ditt-*

man v. Distilling Co., 64 N. J. Eq. 537; *Carroll v. East St. Louis*, 67 Ill. 571; *People v. Chicago Gas Trust*, 130 Ill. 286, 293, 295; *Oregon Ry. Co. v. Oregon Ry. Co.*, 130 U. S. 22; *N. O. & Carrollton R. R. v. City*, 34 La. Ann. 441; *Fertilizing Co. v. Hyde Park*, 97 U. S. 666.

IV.

There is no estoppel, laches or acquiescence, against complainants in favor of the Railroad Securities Company. *George v. Central R. R.*, 101 Ala. 607, 619; *State ex rel. v. Newman*, 51 La. Ann. 833; *State v. Port Royal Ry.*, 45 S. C. 470, 472, 483; *Durkee v. People*, 53 Ill. App. 396, *affd.* 155 Ill. 354; *People v. Brown*, 67 Ill. 435; *Holcomb v. Boynton*, 151 Ill. 275; *Campbell v. Goodall*, 54 Ill. App. 26; *Brant v. Virginia Coal & Iron Co.*, 93 U. S. 335.

No estoppel can arise against the complainants, because the claimed rights of defendant are *ultra vires* in the true sense. *National Home Building Asso. v. Home Savings Bank*, 181 Ill. 35; *California Bank v. Kennedy*, 167 U. S. 362, 367; *DeLavergne Co. v. German Savings Bank*, 175 U. S. 59; *First National Bank v. Converse*, 200 U. S. 425; *Merchants' Nat. Bank v. Wehrman*, 202 U. S. 295; *Thomas v. R. E. Co.*, 101 U. S. 83.

V.

The complainants have the right to maintain this bill. Where a corporation *ultra vires* has acquired a majority of the stock in a corporation, any stockholder has the equitable right to maintain a bill in his own right to restrain the voting of such stock. *Perry Co. v. Stebbins*, 66 Ill. App. 427; reversed in *Stebbins v. Perry Co.*, 167 Ill. 567; *Dunbar v. American Tel. Co.*, 224 Ill. 9, 26; *Bigelow v. Calumet & Hecla Co.*, 155 Ill. 879; *Taylor v. So. Pac. Co.*, 122 Fed. 147; *Lucas v. Milliken*, 139 Fed. 866; *Higgins v. B. & O. R.*, 99 Fed. 641; *Milbank v. N. Y., L. E. & W. R. Co.*, 64 How. Pr. 20; *Hafer v. N. Y., L. E. & W.*, 14 Wkly. Law Bul. 68; *Parsons v. Tacoma Ry. Co.*, 25 Wash. 92; *Hilles v. Parish*, 14 N. J. Eq. 380; *Campbell v. Poultney*, 6 Gill & J. 94; *Webb v. Ridgely*, 38 Md. 364.

VI.

The motives actuating the complainants to bring the bill are immaterial, if they have the right to bring it. *Stone v. Kellogg*, 62 Ill. App. 444, affirmed, 165 Ill. 192; *Mexican Co. v. Mexican Co.*, 61 Ill. App. 354; *Missouri Ry. Co. v. Flannigan*, 47 Ill. App. 322; *Elkins v. Camden R. R.*, 36 N. J. Eq. 5; *Toler v. East Tenn. R. R.*, 67 Fed. 168, 177; *Ramsay v. Gould*, 57 Barb. (N. Y.) 398, 402; Cook on Corporations (4th ed.) pp. 1893, 1894; Morawetz, Private Corporations (2nd ed.) secs. 260, 266.

VII.

The bill does show an impending injury to the complainants, it is not premature, and makes a case for an injunction both preliminary and final. *Fleischman v. Young*, 9 N. J. Eq. 620; *Young v. Grundy*, 6 Cranch, 51; Beach on Injunctions, secs. 286, 287, 290, 307, 308; *Boston Franklinite Co. v. N. J. Zinc Co.*, 13 N. J. Eq. 215; *Lowe v. Board of Com'rs*, 70 N. C. 532; *Murray v. Elston*, 23 N. J. Eq. 127; *Marshall v. Com'rs*, 89 N. C. 103; *Hatch v. Tel. Co.*, 93 N. Y. 640; *Hudson River Co. v. Watervelt T. & R. Co.*, 121 N. Y. 397; *Young v. Roundout Gas. Co.*, 129 N. Y. 57; *Chetwood v. Brittan*, 1 Green Ch. R. 439; *Bigelow v. Calumet & Hecla M. Co.*, 155 Fed. 881; *Jones v. Lemly*, 2 Iredell's Eq. (N. C.) 278; *Miller v. Washburn*, 3 Iredell's Eq. (N. C.) 161; *Atty. Genl. v. Pres. Direc., etc., Oakland Co. Bk.*, Walker's Ch. (Mich.) 90.

The preliminary injunction should not be dissolved where it appears that irreparable injury will be done the complainant, if the court does not continue the injunction if already issued, or grant one on proper application. *Troy v. Normant*, 2 Jones' Eq. 318 (55 N. C. 318) (1856); *McBrayer v. Hardin*, 7 Iredell's Eq. 1; *Purhell v. Daniel*, 8 Iredell's Eq. 8; *Marshall v. Com'rs, etc.*, 89 N. C. 103; *Lowe v. Com'rs, etc.*, 70 N. C. 532; *Lloyd v. Heath et al.*, Busbee's Eq. (N. C.) 39; *Commonwealth v. Pittsburg & C. R. R. Co.*, 24 Pa. St. 159; *Sacramento v. So. Pac. R. R. Co.*, 155 Fed. 1022; 125 Ill. App.

631; *Stroup v. Chalcroft*, 52 Ill. App. 608; *Carlson v. Koerner*, 226 Ill. 15; *Lloyd v. Catlin Coal Co.*, 210 Ill. 460; *Wahle v. Reinbach*, 76 Ill. 332; *Newell v. Sass*, 142 Ill. 104; *Field v. Barling*, 149 Ill. 556.

Where the grounds for equitable relief depend upon questions of law, constitutional questions, or delicate and novel questions of law, not thoroughly settled, or where the dissolution of an injunction granted, would lead to a multiplicity of suits, the preliminary injunction will be continued until the final hearing. *Snyder v. Seeman, et al.*, 41 N. J. Eq. 405 (1886); *Camden & A. R. Co. v. Atlantic City P. R. Co.*, 26 N. J. Eq. 69; *Blindell v. Hagen*, (C. C.) 54 Fed. 40; *Harri-man v. Northern Securities Co.*, 113 Fed. 464; *McBrayer v. Hardin et al.*, 7 Iredell's Eq. 1; *Sullivan v. Jones Co.*, 208 Pa. St. 540 (1903); *Hunt v. Steese*, 75 Cal. 620; *Owen v. Brien*, 2 Tenn. Ch. 295; *New Jersey Co. v. Trotter*, 38 N. J. Eq. 3; *Reed v. Jones*, 6 Wis. 655; *Lucas v. Milliken*, 139 Fed. 816; *Dady v. Ga. & A. Ry. Co.*, 112 Fed. 838; *McHenry v. Jewett*, 90 N. Y. 58; *Commissioners v. P. & C. R. R.*, 24 Pa. St. 159; *Field v. Barling*, 149 Ill. 556; *Wahle v. Reinbach*, 76 Ill. 322; *Newell v. Sass*, 142 Ill. 104.

BRIEF FOR DEFENDANTS.

Messrs. *Winston, Payne, Strawn & Shaw*, *John J. Herrick*, *A. S. Lovett* and *Sullivan & Cromwell* and *John M. Dickinson*, attorneys for defendants.

I.

The Railroad Securities Company is the owner by a valid title, of the stock held by it, and can, therefore, lawfully vote it.

(a) Under the law of comity the Railroad Securities Company, having the power by its charter, could lawfully purchase and hold stock in an Illinois corporation, as authorized by its charter and having acquired it, exercise the right incident to its ownership, that of voting the stock in Illinois, unless its purchase and holding of the stock was either prohib-

ited by some express statutory provision, or was contrary to the public policy of the state, as manifested in some affirmative way, either by the express adjudications of the highest court of the state, or the course of its legislation. *Morawetz on Corporations*, sec. 960-962, 966; *Cowell v. Springs Co.*, 100 U. S. 55; *Christian Union v. Yount*, 101 U. S. 352; *Stevens v. Pratt*, 101 Ill. 206; *Female Academy v. Sullivan*, 116 Ill. 375; *People v. Fidelity & Casualty Co.*, 153 Ill. 25; *United States Mortgage Co. v. Gross*, 93 Ill. 483.

1. There are no adjudications of the supreme court of Illinois that it is contrary to the law or public policy of Illinois for a corporation of another state, having power by its charter so to do, to own and hold stock in another corporation in Illinois, and exercise the right incident to its ownership—that of voting the stock. *People ex rel. v. Chicago Gas Trust Co.*, 130 Ill. 268; *People ex rel. v. Pullman's Palace Car Co.*, 175 Ill. 125; *Dunbar v. American Tel. Co.*, 224 Ill. 9.

2. There is no legislation in Illinois which affirmatively shows that it is against the public policy of the state for the Railroad Securities Company to own and vote the stock held by it, as authorized by its charter and the rule of comity. Sec. 26, General Incorporation Act of Illinois; *Stevens v. Pratt*, 101 Ill. 206, 216, 219; *Wincock v. Turpin*, 96 Ill. 135, 144; *Mead v. Davies*, 84 Ill. App. 558; *Union Mutual Insurance Co. v. Trear Stone Mfg. Co.*, 97 Ill. 537; *Western Mfg. M. Ins. Co. v. Hutchinson Cooperage Co.*, 92 Ill. App. 16; *Ross v. Knapp, Stout & Co.*, 77 Ill. 424, 426.

3. If it be assumed as contended for complainants, that the statutes of Illinois do not authorize the organization in Illinois of corporations to do the business which the Securities Company was organized to do, this does not manifest a public policy of the state against such corporations purchasing and holding stock in an Illinois Corporation, and exercising in Illinois the right incident to its ownership—that of voting the stock. That there is, in fact, no such policy, is affirmatively shown by different acts of the legislature expressly authorizing different corporations to invest their funds in the

purchase of stock of other corporations. *Stevens v. Pratt*, 101 Ill. 206, 225, 227; *People v. Fidelity Insurance Co.*, 153 Ill. 25; *United States Mortgage Co. v. Gross*, 93 Ill. 483; Act of 1883, Hurd's Revised Statutes 1906, pp. 1170, 1180; Act of 1869, Hurd's Stat. 1906, pp. 1205, 1206; Act of 1887, Hurd's Stat. 1906, p. 540; Act of 1897, Hurd's Stat. 1906, p. 542.

4. The exercise by the Securities Company of its power, under its charter, to own and vote the stock held by it in the Illinois Central Company, is not contrary to the public policy of Illinois, as manifested by its legislation, but is in accordance therewith, for the reason that the organization of corporations, having the same object and the same powers when organized as the Railroad Securities Company is authorized by the General Incorporation Act of Illinois. General Incorporation Act of Illinois, secs. 1, 5; *People v. Pullman Car Co.*, 175 Ill. 159; *Pearson v. Railroad*, 62 N. H. 537, 548, 549. The right to vote stock is an ordinary incident of its ownership the same as the right to collect dividends. *Davis v. U. S. Electric Power & Light Co.*, 77 Md. 35, 39; *Taylor & Co. v. Southern Pac. Co.*, 122 Fed. 147, 151, 152; *Lucas v. Milliken*, 139 Fed. 816, 835, 836; *Camden & U. R. R. Co. v. Elkins*, 37 N. J. Eq. 273, 276. The purpose for which the Railroad Securities Company was organized, as evidenced by its charter ("to purchase, receive, hold and own" bonds, shares of capital stock, etc., of different kinds of corporations specified, etc., etc.), and the acts which it has done under it, is a lawful purpose. *Oregon Ry. Co. v. Oregonian Ry. Co.*, 130 U. S. 1; *Harding v. Glucose Co.*, 182 Ill. 551; *United States Vinegar Co. v. Schlegel*, 67 Hun, 356, 360; *State v. Corkins*, 123 Mo. 56; *People v. Chicago Gas Trust Co.*, 130 Ill. 268, 283, 287, 290, 291, 292, 293; *Dunbar v. American Telephone Co.*, 224 Ill. 9; 1 Cook on Corporations, secs. 310, 317, pp. 691, 696, 697; *Market St. Ry. Co. v. Hellman*, 109 Cal. 571, 589; *National Bank v. Texas Investment Co.*, 74 Tex. 421; *State v. Minnesota Thresher Mfg. Co.*, 40 Minn. 213, 223; *Vokes v. Eaton*, 119 Ky. 913; *State v. Corkins*, 123 Me. 56; *York Park Bldg. Asso. v. Barnes*, 39 Neb. 834, 838; *Enterprise Brg. Co.*

v. Grime, 173 Mass. 252; *Brown v. Corbin*, 40 Minn. 508; *Cahall v. Citizens' Mutual Bldg. Asso.*, 61 Ala. 232; *Killingsworth v. Portland Trust Co.*, 18 Oregon, 351.

5. The entire transaction of the purchase by the Railroad Securities Company of its stock in the Illinois Central Railroad Company, including the transfer and registration of the stock in its name, was done outside of Illinois, and, for that reason, did not involve the exercise by the Securities Company of any corporate power in Illinois; and it being indisputable that there is no public policy of Illinois against a foreign corporation, which owns stock in an Illinois corporation, exercising the power of voting the stock, which is incident to the ownership it follows that the Railroad Securities Company can lawfully vote the stock. *Charter Illinois Central Railroad*, 1851; *Merritt v. American Steel Bridge Co.*, 79 Fed. 228; *State v. Newman*, 51 La. Ann. 833, 837, 838.

6. The fact that the Union Pacific Company acquired from the individuals who owned it, a controlling interest in the stock of the Securities Company in October, 1906, is immaterial to the question under consideration—whether the Securities Company acquired a valid title to the stock in the Illinois Central Company it purchased in 1901, and can lawfully exercise the right incident to its ownership—that of voting the stock. *Hopkins v. Roseclare Lead Co.*, 72 Ill. 373, 379; *Sellers v. Greer*, 172 Ill. 549, 556; *England v. Dearborn*, 141 Mass. 590; *Button v. Hoffman*, 61 Wis. 20; *Peterson v. C. R. I. & P. Ry.*, 205 U. S. 364, 391, 392; *Pullman's Palace Car Co. v. Missouri Pac. Co.*, 115 U. S. 587, 597; *Farmers' Loan & Trust Co. v. C. P. & S. Ry.*, 39 Fed. 143; *C. Kase v. Michigan Telephone Co.*, 121 Mich. 631; *A. T. & S. F. R. Co. v. Cochran*, 43 Kan. 225, 233, 235; *Lange v. Burke*, 69 Ark. 85, 89.

7. The foreign corporation Act of 1905 has no application to the only act which the Railroad Securities Company has done since it acquired the stock in 1901, or to the only act which it intends to do—the act of voting the stock at stockholders' meetings. *Illinois Foreign Corporation Act of 1905*. Under the facts, the only act which the Securities Company

has threatened or intends to do, the voting of the stock, is not within the terms and intention of the Act. 3 Clark & Marshall on Corporations, sec. 826, p. 2710; 13 Am. & Eng. Enc. Law (2d ed.) 872; *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727, 734; *Peterson v. C. R. I. & P. Ry.*, 205 U. S. 364, 392, 394; *Penn. Collieries Co. v. McKeener*, 183 N. Y. 98; *D. & H. Canal Co. v. Mahlenbrock*, 63 N. J. L. 281, 287; *Kephart v. People*, 28 Colo. 73, 76. The Act was intended to be prospective only. *Richardson v. U. S. Mortgage Co.*, 194 Ill. 259; *Chicago Title & Trust Co. v. Bashford*, 120 Wis. 281; *Key-stone Mfg. Co. v. Howe*, 89 Minn. 256; *Pioneer, etc., Loan Co. v. Cannon*, 96 Tenn. 599. If by any construction of the Act, the voting of the stock could be brought within the intention of the statute, it would impair the obligation of the contract, and deprive the defendant company of a property right incident to its ownership of the stock—the right to vote it—without due process of law. *State v. Greer*, 78 Mo. 188; *Taylor v. Southern Pacific Co.*, 122 Fed. 147, 151, 152; *Richardson v. U. S. Mortgage Co.*, 194 Ill. 259.

II.

The complainants are barred by their laches and acquiescence from obtaining the equitable relief of an injunction against the voting of the stock held by the Railroad Securities Company. *Simmons v. B. C. R. & N. R. Co.*, 159 U. S. 228, 291; *St. L. & T. H. R. Co. v. T. H. & I. R. Co.*, 145 U. S. 393.

(a) Stockholders are barred by laches and acquiescence from obtaining affirmative relief as to a contract or transfer of title by or to a corporation on the ground that it was *ultra vires*. *Dimpfell v. O. & M. Ry. Co.*, 110 U. S. 209; *Kent v. Quicksilver Mining Co.*, 78 N. Y. 159; *Alexander v. Searcy*, 81 Ga. 526; *Campbell v. Railroad*, 111 Tenn. 55; *Terry v. Eagle Lock Co.*, 47 Conn. 141; *Rabe v. Dunlap*, 51 N. J. Eq. 40; *Taylor v. S. & N. A. R. Co.*, 13 Fed. 152; *Boyce v. Montauk Gas Coal Co.*, 37 W. Va. 73; *Levin v. Chicago Gas Light & C. Co.*, 64 Ill. App. 393; *Higgins v. Lansingh*, 184 Ill. 301, 391.

(b) A stockholder is barred by laches and acquiescence from obtaining relief on the ground that the transaction was unlawful for other reasons. *Coquard v. Nat'l Linseed Oil Co.*, 171 Ill. 480; *Perry Co. v. Stebbins*, 66 Ill. App. 427; *Stewart v. E. & W. Transp. Co.*, 17 Minn. 372, 399, 400.

(c) Where the complainant has means of knowledge of which he fails to avail himself this may amount to laches that will prevent relief. *Coquard v. Nat'l Linseed Oil Co.*, 171 Ill. 480; *Jesup v. I. C. R. R. Co.*, 43 Fed. 483; *Leavenworth Co. v. C. R. I. & P. Ry.*, 18 Fed. 209; *Kimbell v. Chicago Hydraulic Press B. Co.*, 119 Fed. 102; *Boyce v. Coal Co.*, 37 W. Va. 73, 88, 89; *Kent v. Quicksilver Mining Co.*, 78 N. Y. 159.

(d) Participation and acquiescence by proxy is as effectual as personal acquiescence. *Zabinskie v. C. C. & C. R. Co.*, 23 How. 381, 400.

(e) Stock purchased in anticipation of instituting suit is open to suspicion. *Dimpfell v. O. & M. R. Co.*, 110 U. S. 209, 210.

(f) A purchaser of shares of stock acquires no greater rights than the prior holder, and if his predecessor in title has acquiesced in the transaction complained of he is also bound by such acquiescence. *Morawetz on Corporations*, sec. 267; *Campbell v. Railroad*, 111 Tenn. 553; *Trimble v. American Sugar Refining Co.*, 61 N. J. Eq. 340; *Hyde Park Gas Co. v. Kerber*, 5 Ill. App. 132.

III.

The Union Pacific Company is the owner by a valid title of the stock held by it, and can, therefore, lawfully vote it. Act of Utah, 1901 (ch. 26, sec. 5):

(1) There is no course of legislation in Illinois which manifests affirmatively a public policy of the state against the purchase and holding by a foreign railroad company, in the exercise of the power granted by its charter, of stock in an Illinois corporation owning a connecting road, and the exercise by it for a lawful purpose of right incident to its ownership—that of voting the stock. Illinois Foreign Corporation

Act of 1905; sec. 26, General Incorporation Act of Illinois; sec. 14, General Railroad Act of Illinois.

(2) So far from the adjudications of the courts of Illinois, or its course of legislation, manifesting a public policy against one railroad company acquiring the interest in another railroad company evidenced by the purchases of its stock, where the lines of the two companies are connecting, the legislation of the state shows affirmatively a well settled policy to authorize and promote the union of ownership and interest of connecting lines by every form of ownership or interest—operating contracts, purchase, lease, consolidation, purchase of stock, etc. Act of 1855 to enable railroads to enter into operative contracts, Rev. Stats. 1906, p. 1573; *Illinois Midland Ry. Co. v. People*, 84 Ill. 426; *Penn. Co. v. St. L. A. & C. R. Co.*, 118 U. S. 290, 309; Act of 1875, Rev. Stats. 1906, p. 1573; Act of 1885, Rev. Stat. 1906, p. 1606; secs. 1, 8, Consolidation Act, Rev. Stats. 1906, p. 507; Act of 1891, sec. 14, Rev. Stat. 1905, p. 1567; Act of 1899, Rev. Stats. 1906, p. 1611.

(3) Even if, as is contended, the legislature of Illinois has not deemed it best to vest such power in its own railroad corporations, this is not such affirmative evidence of a public policy of the state against foreign railroad corporations purchasing and owning stock in other corporations, when authorized by their charters to do so, as will render the purchase and ownership of the stocks thus acquired unlawful, under the rule of comity.

(4) The Illinois Statute of 1899 recognizes, and is, in legal effect, a legislative declaration that it is not contrary to the public policy of Illinois for a foreign railroad company, which has the power by its charter so to do, to purchase and hold stock in a railroad corporation of this state owning a connecting line. Rev. Stat. 1906, p. 1611, as to foreign corporations holding stock in Illinois railroad corporations; *Christian Union v. Yount*, 101 U. S. 352; *Stevens v. Pratt*, 101 Ill. 206.

(5) The entire transaction of the purchase by the Union Pacific Company of its stock in the Illinois Central Com-

pany, including the transfer, was done outside of Illinois, and, for that reason, did not involve the exercise by the Union Pacific Company of any corporate power in Illinois; and, it being indisputable that there is no public policy of Illinois against a foreign corporation, which owns stock in an Illinois corporation, exercising the power of voting the stock, which is incident to the ownership, it follows that the Union Pacific Company can lawfully vote the stock.

IV.

The transactions of the purchase and sale of the stock held by the Railroad Securities Company and the Union Pacific Company are executed transactions, and the validity of their title to it cannot now be questioned by the complainants.

(1) The validity of the sales and transfers of the stock to the defendant companies, which were completely executed long before the filing of the bill, cannot be questioned by any of the parties to the transactions of sale and transfer or anyone claiming under them (much less by third persons not parties to the transfer) on the ground that it was *ultra vires* the corporation. In such case only the state can raise the question. *Clark & Marshall on Corporations*, vol. 1, p. 553; *C. H. & D. R. Co. v. McKeen*, 64 Fed. 36; *Dewey v. Toledo, Ann Arbor & N. M. R. Co.*, 91 Mich. 351; *Long v. Georgia Pacific Ry. Co.*, 91 Ala. 519; *Baker v. Northwestern Guaranty Loan Co.*, 36 Minn. 185; 29 Am. & Eng. Enc. Law (2d ed.) 80; *Clark & Marshall on Corporations*, 609, 611; *Railroad Co. v. Ellerman*, 105 U. S. 166, 173, 174; *Parish v. Wheeler*, 22 N. Y. 494, 503, 508; *John V. Farwell Co. v. Wolf*, 96 Wis. 10, 13, 16; *Peru Plow & Implement Co. v. Harker*, 144 Fed. 673, 674; *Bigbee & Warrior River Packet Co. v. Moore*, 121 Ala. 379, 382; *Belcher Sugar Refining Co. v. St. Louis Grain Elevator Co.*, 101 Mo. 192, 208; *State Insurance Co. v. Farmers' Mutual Insurance Co.*, 65 Neb. 34, 41; *Smith v. First Nat'l. Bank*, 45 Neb. 444, 449; *D. & J. D. Edwards v. Fairbanks*, 27 La. Ann. 449, 450; *Rafferty v. Central Traction Co.*, 147 Pa. St. 579; *Beels v. Fair Asso.*, 54 Neb. 226; *Taylor v. Calloway*, 27 S. W. 934; *Collins v. Rea*, 127 Mich. 273.

(2) If, as we have shown, the title which the two companies acquired, to the stock cannot be questioned by the complainants, on the ground that the purchase was *ultra vires* the corporation by reason of the fact that the transactions were executed, and also because they are third parties to the transaction, it follows that, for the same reason, they cannot question the power of the two companies to exercise the rights which are the incidents of, and belong to the ownership of, the stock, including the right to vote it.

(a) The right to vote stock is incident to its ownership. *Rogers v. N. C. & St. L.*, 91 Fed. (C. C. A.) 312; *Oelberman v. N. Y. C. Co.*, 29 N. Y. S. 545; *Davis v. U. S. Electric Power & Light Co.*, 77 Md. 35, at 39; *Taylor v. Southern Pacific Co.*, 122 Fed. 147, at 151, 152; *Lucas v. Milliken*, 139 Fed. 816. See *State v. Newman*, 51 La. Ann. 833, 837.

V.

Under the facts shown by the evidence and under the well settled law governing the subject, the complainants have not made such a case as entitles them to a preliminary injunction enjoining the voting of the stock. 2 Cook on Corporations, sec. 616 (p. 1327); *Lucas v. Milliken*, 139 Fed. 816, 833, 836; *Reed v. Jones*, 6 Wis. 680, 692; *Dady v. Ga. & A. Ry.*, 112 Fed. 838, 845; *McHenry v. Jewett*, 90 N. Y. 58, 62; High on Injunctions, sec. 5a; *American Refining Co. v. Linn*, 93 Ala. 610; *Blatchford v. Chicago D. & D. C.*, 22 Ill. App. 370; *Fritz v. Erie City Passenger Ry.*, 155 Pa. St. 472; *Smith v. Reading City Pass. Ry.*, 156 Pa. St. 5; *Citizens' Coach Co. v. Camden Horse R. R. Co.*, 29 N. J. Eq. 299; *Ocean City Asso. v. Schurch*, 57 N. J. Eq. 268; *Newark Aqueduct Board v. Passaic*, 46 N. J. Eq. 552; *Wait v. Chichester Chair Co.*, 45 Fed. 258.

OPINION.

BALL, J.:—

This case comes before the court on a motion to dissolve the temporary injunction.

It is urged that complainants, under the rules of equity practice should have requested the officers and directors of the Illinois Central to bring this suit—that such a request and a refusal by the corporation are necessary prerequisites to their right to begin this action.

This suit might have been brought by the Illinois Central. Its subject matter is one in which all the stockholders of that corporation are equally interested. The bill is framed on that theory. It states that complainants bring this action “in their own behalf, and in behalf of all stockholders of the Illinois Central Railroad Company similarly situated who may unite with them and become parties complainant to this bill of complaint.”

Before a stockholder is entitled in his own name to institute and conduct a litigation which usually belongs to the corporation he should show to the satisfaction of the court that he called upon the directors to bring the suit and their neglect or refusal to comply with his request; or he must show that an application to them would have been futile, and therefore useless. Where the stockholder brings such an action the bill should contain an account of such demand and refusal, or should state facts and circumstances showing that such demand would have been an idle ceremony. *Chicago v. Cameron*, 120 Ill. 447, 457; *Bruschke v. Der Nord Chicago Schuetzen Verein*, 145 Ill. 433, 445; *Green v. Hedenberg*, 159 Ill. 489; *Stebbins v. Perry County*, 167 Ill. 567; *Harding v. American Glucose Co.*, 182 Ill. 551, 629; *Hawes v. Oakland*, 104 U. S. 450, 460; *Rogers v. Nashville C. & St. L. Ry. Co.*, 91 Fed. Rep. 299, 306.

The bill as amended alleges that complainants made no application to the company to bring this suit first, because they believe they have the individual right as stockholders to bring this action; and, second, that it would have been an idle ceremony to have made such application, because eight of the thirteen directors of the Illinois Central believe that the Union Pacific and the Securities Company have the right to hold and to vote the stock severally owned by them; because

three of these directors have participated in the unlawful acts complained of, and five others of them would have been advised by Harriman not to allow the bringing of such a suit and would have followed such advice; and because of the personal hostility of eight of said directors to Fish they would not have permitted such suit to be brought.

Passing the first reason given, as it is a legal conclusion, the alleged facts stated as the basis of the second reason are vigorously denied in the affidavits filed by said eight directors. They say that the right of the Union Pacific and of the Securities Company to hold and to vote the stocks held by them severally never came up nor was it ever considered by them prior to the bringing of this suit, that they are not dominated by Harriman, that he never advised with them in this regard, and if he did, each of them would have followed his individual and independent judgment in passing upon the question; and that the personal hostility charged, if any they have toward Fish, has arisen since this suit was commenced, and was brought about by the acts and statements of Fish herein.

The history of the Illinois Central for the last eighteen months clearly shows that a dispute between Fish and his friends on the one side, and Harriman and his friends on the other, has been on. In 1906 each party scored a victory. The Fish faction defeated DeForest as a director; and the Harriman faction elected Harahan as president in place of Fish. As the annual election of 1907 approached it is apparent each faction exerted itself to obtain proxies favorable to its plans. The hostility between these parties was open and aggressive. In this condition of affairs it is not reasonable to presume, if application had been made to the directors (a majority of whom are frankly opposed to Fish and to his plans) to begin this suit, which if successful would deprive them of half their voting strength, that such request would have been granted. I am therefore of the opinion that, in this particular, complainants have shown their right to begin and to carry on this action. *Rogers v. Nashville, C.*

& St. L. Ry. Co., 91 Fed. Rep. 299, 306; *Mack v. De Bardeleben Coal & Iron Co.*, 90 Ala. 396, 8 So. 150.

The only thing averred and proved in this case as to the future actions of the defendants is that at the coming election the Union Pacific and the Securities Company will vote the stock they severally own and control for the re-election of three of the present directors, each of whom has served the Illinois Central acceptably for many years, and for a fourth director, in place of Mr. Fish, a competent man who is not in any way connected with the Union Pacific. No act prejudicial to the Illinois Central, or to its stockholders, is shown to have been done, unless the mere fact that the Union Pacific and the Securities Company own 29 per cent. of the stock of the Illinois Central be considered to be so. No change in the purpose or conduct of the Illinois Central is averred. The history of the company shows that since the retirement of Mr. Fish from the presidency the policy of the company has been the same, and its executive officers, with one exception caused by death, have remained the same from that day to this. The relations between the Union Pacific and the Illinois Central are now what they were when Mr. Fish was in power and assisted in shaping and consented to such relations. Nor is any change intended, if the affidavits of well known and reputable men be considered as true. The bill, however, charges many things which may happen to the detriment of the Illinois Central and to its stockholders if the Union Pacific and the Securities Company be permitted to vote at such meeting; but no facts are alleged or proved which even tend to bring about such results. Courts of equity act on facts alleged and proved, and not on fears, nor even on supposed prophesies. If it were not for the fact that the name of Harriman is a name to conjure with these allegations would not be taken so seriously. There are many things stated in the bill as to the intention of the defendants, which, if put in force, or even attempted to be put in force, would call upon the court to intervene; but a diligent search of this record fails to show that such

things exist in any concrete form. To put their contention into a few words: complainants say that if the Union Pacific and the Securities Company are permitted to vote at the coming election, the hold of Mr. Harriman upon and his domination over the Illinois Central will be strengthened, and that finally the Illinois Central will be reduced to a servient position and will be given the lean end of the carrying trade. But they fail to allege and prove facts supporting these allegations. The rule is that unless the statements of the bill are sustained by pleaded and proved facts they become the mere conclusions of the pleader, which need not be controverted by the defendants, and which will not be enforced by the decree of the court. This rule is strictly enforced where fraud or bad faith is charged. *Sterling Gas Co. v. Higby*, 134 Ill. 557; *Chicago v. People*, 210 Ill. 84. In every case cited by complainants to support the bill in this regard some act was alleged and proved which directly tended to produce, or directly produced, the unlawful purpose or inflicted the injury the bill was filed to remedy or to prevent.

It is to be presumed, until the contrary affirmatively appears, that any man elected as a director of a corporation will do his duty; that he will not knowingly act, either singly or in concert with his fellow directors, so as to impair the usefulness of his corporation, or to squander its property; nor to turn it over, bound hand and foot, to the control of another corporation. *Mack v. De Bardeleben Coal & Iron Co.*, 90 Ala. 396, 8 So. 150; *Boyd v. Sims*, 87 Tenn. 771, 11 S. W. 948.

While Mr. Fish may rightfully and honorably desire to remain a director of the Illinois Central, and to accomplish that end may use every lawful means in the power of himself and of his friends, he has no right to that office until he is elected thereto by a majority of the votes cast by the shareholders entitled to vote at a valid meeting called for that purpose. Hence, his defeat, if it comes from the lack of valid votes, is no legal injury to the civil or property right of Fish or those of his fellow complainants.

As private citizens the complainants are not the keepers of the public conscience, nor are they the conservators of the rights of the public. To sustain this bill it is not sufficient for them to show merely that the act complained of is a public wrong; they must also show that by the doing of such act they will suffer a special injury to their civil or to their property rights. *North American Insurance Co. v. Yates*, 214 Ill. 272, 283. This election of directors at the coming meeting can work no legal wrong to complainants, and no impending special injury to them or to any or to either of them is proved which calls for the interposition of this court. It is the clear right of a majority of the stockholders of a corporation to elect a board of directors that will carry out its wishes. *Lucas v. Milliken*, 139 Fed. 816.

One who owns stock in a corporation has a right to vote such stock at any and every lawful meeting of the stockholders of the corporation. This right to vote is an integral and necessary part of ownership, and is as vital as is the right to receive the dividends lawfully declared upon such stocks. *Rogers v. Nashville C. & St. L. Ry. Co.*, 91 Fed. 299, 312; *Taylor v. Southern Pacific Co.*, 122 Fed. 147, 151; *Lucas v. Milliken*, 139 Fed. 816; *Davis v. United States Electric Power & Light Co.*, 77 Md. 35, 25 Atl. 982.

I do not understand that at common law, when the ownership of stock in a corporation has been legally acquired, such ownership is a qualified one. If it is thus owned, whether by an individual or by a corporation, none of the rights attending ownership lie dormant or are incapable of being exercised.

The findings and opinion of the Interstate Commerce Commission are not evidence in this case. The act itself provides that such findings shall be *prima facie* evidence in civil cases only brought in the United States circuit court to enforce the commissioners' award of damages. Railway Rate Act of June 29, 1906.

"The commission is charged with the duty of investigating and reporting upon complaints, and the facts found or reported by it are only given the force and weight of *prima*

facie evidence in all such judicial proceedings as may thereafter be required or had for the enforcement of its recommendation or order. * * * It is neither a federal court under the constitution, nor does it exercise judicial powers, nor do its conclusions possess the efficacy of judicial proceedings." *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.*, 37 Fed. 567, 613.

This court has no power to enforce the Sherman Act. That act limits all equitable remedies to suits brought in the federal courts by the district attorney under the authorization of the Attorney General of the United States. *South. Indiana Exp. Co. v. United States Exp. Co.*, 92 Fed. 1022; *Minnesota v. Northern Securities Co.*, 194 U. S. 48.

There is but one ground upon which this bill can be maintained. If the Union Pacific had no right to buy, hold or own stock in the Illinois Central, or the Securities Company stands in the same category, and both are or either of them is intruding in this election wholly without right, then I think any *bona fide* stockholders, without alleging irreparable injury, may ask the court to throw them or it out. To hold otherwise would be to permit an intruder to interfere in the conduct and control of the corporation against the wishes of its lawful owners, on the ground that what such intruder was attempting to do was not an irreparable injury to such *bona fide* owners. *Stebbins v. Perry Co.*, 167 Ill. 567; *Dunbar v. American Telephone & Telegraph Co.*, 224 Ill. 9, 26; *State v. Port Royal & A. Ry. Co.*, 45 S. C. 470, 23 S. E. 383.

This brings us to the question, is there in the public policy of this state a prohibition against the voting by a foreign corporation of stock in a domestic corporation, which stock, it purchased and paid for and owns and holds under an express power granted to it by the state of its creation?

The mere fact that the Securities Company and the Union Pacific are corporations does not debar them from buying and holding the stock of other corporations or from enjoying all the rights and privileges which accompany such ownership. Several classes of corporations, presumably having

funds to invest, are authorized by the statutes of this state and by the laws of almost all of the other states of the union, to invest such funds in the stocks of other corporations. Other things being equal, it is for the benefit of any domestic corporation, having stock for sale and depending upon such sales for the money necessary to carry on the objects for which it is created, not only to have a world wide market in which to effect its sales, but also to have as few as possible of would-be purchasers disabled from buying.

Nor does the mere fact that such investing corporations are foreign corporations and the purchase made is of stock in a domestic corporation change the rule of law; for by the statutes of this state many classes of foreign corporations are expressly empowered to buy stock in domestic corporations.

The reason why purchases of the stock of the Illinois Central by the Securities Company and by the Union Pacific are invalid, if they are invalid, must be found elsewhere than in the fact that they are foreign corporations.

It must be conceded that one corporation may by the state of its creation be given the power to lay out, construct and operate a railroad; to another the power to accept trusts; to another the power of insurance; and to each of these may be added the power to buy, hold and sell the stock of other corporations. When two distinct powers are thus granted, the existence of one of the powers does not depend on the existence, or on the exercise of the other power. One power only may be expressly given to a corporation; and in nearly all, if not all of the states of the union, that single express power may be that of buying, owning and holding the stock of other corporations. Railroads as well as investment companies, or insurance companies, or trust companies, may have funds which they desire to invest, for a longer or shorter time, in the stocks of other corporations. Whether it is wise for them to do so, the power being granted, is a question for the officers and directors of the investing company, and for no one else to decide. For a railroad company thus to invest its

funds is not *malum in se*, and in the absence of an express statutory prohibition, or public policy to the contrary in the local jurisdiction of the corporation in whose stock it thus invests, it is not *malum prohibitum*. There is nothing peculiar to a railroad corporation that differentiates it from other corporations so far as any question of comity, or danger, or prejudice to the interests of the people or the public interests is involved. *Thompson v. Waters*, 25 Mich. 214, 234.

I do not understand that there is any general rule of the American common law that one corporation cannot own stock in another corporation. The rule referred to by complainants' counsel is that a corporation cannot become a stockholder in another corporation unless power to do so is specifically granted in its charter or is necessarily implied in it. (*People v. Pullman's Palace Car Co.*, 175 Ill. 125, 159.) And this latter rule is one of construction only, and based upon the ground that such a transaction is generally foreign to the objects of its creation, and is a departure from its charter purposes, and not upon any notion that the nature of a corporation renders it incapable of taking and holding stock in other corporations. A corporation, therefore, may take and hold stock in another corporation whenever it is expressly authorized to do so. (1 Clark & Marshall on Corporations, 527.) In this case it is proved, and not controverted, that the Union Pacific and the Securities Company each has express power granted to it by the state of its creation to buy, own and hold stock in other corporations.

The law of comity among the states is that rule "which in the absence of positive direction to the contrary, obtained through the states and territories of the United States, by which corporations created in one state or territory are permitted to carry on any lawful business in another state or territory and to acquire, hold and transfer property there equally as individuals. If the policy of the state or territory does not permit the business of the foreign corporation in its limits, or allow the corporation to acquire or hold real property, it must be expressed in some affirmative way; it cannot

be inferred from the fact that its legislature has made no provision for the formation of similar corporations, or allows corporations to be formed only by general law."—*Stevens v. Pratt*, 101 Ill. 206, 225. See also: *Santa Clara Female Academy v. Sullivan*, 116 Ill. 375; *People v. Fidelity & Casualty Co.*, 153 Ill. 25; *Cowell v. Springs Co.*, 100 U. S. 55; *Christian Union v. Young*, 101 U. S. 352.

The public policy of a state is to be found in the statutes, and when they have not directly spoken, then in the decisions of the courts and in the constant practice of government officials. When the legislature speaks upon a subject upon which it has the constitutional power to legislate, public policy is what the statute passed by it indicates. (*Harding v. American Glucose Co.*, 182 Ill. 551, 616. Cited with approval in *North American Insurance Co. v. Yates*, 214 Ill. 272, 277.) Public policy is that which the state adopts by statute, unless such statute is contrary to the constitution of the state or the United States. (*Whitfield v. Aetna Life Insurance Co.*, 205 U. S. 489, 495.)

There is in the law of this state no discrimination against foreign corporations, but they are given a hospitable reception and are placed upon an equal footing with our domestic corporations. (*Santa Clara Female Academy v. Sullivan*, 116 Ill. 375, 383.)

Four cases decided by the supreme court of Illinois are cited as having some bearing on the question whether or not it is against the public policy of the state to permit a foreign corporation, having the power by its charter to buy, own and hold stock in another corporation, to buy, own and hold stock in a domestic corporation.

The People v. Chicago Gas Trust Co., 130 Ill. 268, was a *quo warranto*. It appeared that the Gas Trust was a domestic corporation. By its charter it had power to manufacture and to sell gas. In the articles filed with the secretary of state it named as one of the objects of its incorporation the power to purchase and hold the capital stock of similar corporations. It appeared that the Gas Trust Company had not

manufactured and sold gas, but it had purchased a majority of all the stock of each of the four separate and independent gas companies located and doing business in the city of Chicago. It was held that the control of these four companies suppressed competition between them, and destroyed their diversity of interest and all motive for competition, and thus built up a virtual monopoly. It was further held that the corporation was not formed for a lawful purpose, and all acts done by it to accomplish such object were null and void, and that where corporations are formed under the general law, the law, and not the statement or license or certificate, determines what powers are granted.

In *The People v. Pullman's Palace Car Co.*, 175 Ill. 125, the Pullman company was chartered by this state to purchase, build and run railway cars. After its organization, as time went on, it became possessed of a city office building, a multiform factory for the construction of cars, and lands and sidings for the storage of cars. It also purchased additional lands and built thereon a town of dwellings, shops and public buildings for the use and benefit of its workmen; and it purchased and held the stock of another corporation the Pullman Iron & Steel Company, which it alleged, though nominally independent, was really a part of its own plant. Upon these facts the attorney general brought a writ of *quo warranto* against the Pullman Company. The supreme court decided that under its charter the company could own and hold such real estate as was necessary for the convenient transaction of its business; and therefore the owning and holding of the city office building, the factory, and the lands for siding and storage of cars were within its powers; but that the building up and running of the town of Pullman was *ultra vires*, and therefore it was directed to sell the same. It was also held that under its charter the company had neither the express power, nor the implied power, to purchase the stock of another corporation, and therefore it had no right or power to buy or own the stock of the Pullman Iron & Steel Company.

In *McCoy v. Worlds Columbian Exposition*, 186 Ill. 356,

McCoy subscribed for 1,000 shares of the capital stock of the appellee company. When sued for the amount of calls made on the stock, the trial court directed a verdict against him. On appeal he attacked this direction upon the ground that the stock had not been fully subscribed at the time the calls were made. It appeared that all the stock had been subscribed for, but part of those subscriptions had been made by domestic corporations and by national banks; and he argued that as these subscriptions were *ultra vires* the several corporations, they were not binding. Upon this contention the court says: "Corporations organized under the laws of this state cannot become stockholders in other corporations unless power is specifically given by their charters or necessarily implied from them (*People v. Chicago Gas Trust Co.*, 130 Ill. 268), and national banks have no power to subscribe for capital stock of other corporations." The court then goes on to say that such corporations might make that defense or not as they pleased; but there was no proof that they had done so, and that appellant could not make this defense for them. The judgment against him was affirmed.

In *Dunbar v. American Telephone & Telegraph Co.*, 224 Ill. 9, a bill was brought by minority stockholders to annul the purchase by the defendant company, a foreign corporation, of a majority of the stock of the Kellogg Company, an Illinois corporation. The court found as fact that the "American Company, through defendant Barton and others, became the purchaser of the shares of stock, with the unlawful purpose and intention of putting the Kellogg Company out of business or so using and controlling it as to prevent rivalry in business and creating a monopoly," (p. 22) and then found, as law, that such conduct on the part of the American Company was fraudulent as against the stockholders of the Kellogg Company, and against which, on the plainest principles of equity, a stockholder in the Kellogg Company should have the right to relief. (p. 29.)

It will be seen that no one of these cases touches the question as to whether or not it is against the public policy of

this state for a foreign corporation to purchase, hold and vote stock, which it had the express right by its charter to acquire, in a domestic corporation.

What is the public policy of the state of Illinois upon the question, as shown by its statutes?

For forty years last past the statutes of the state have recognized the right of foreign corporations, other than railroads, to invest their funds or any part thereof in the stock of domestic corporations.

By dismissing the Mutual Insurance Company of New York, holding 5,500 shares of Illinois Central stock, out of this case the complainants impliedly admit that this is the law as applied to life insurance companies.

The Act of 1869 permits domestic fire, marine and inland navigation insurance companies to invest their funds in "the stocks, bonds or other evidences of indebtedness of any solvent, dividend paying institution incorporated under the laws of this state or of the United States, except their own stock:" (Hurd's Illinois Statutes, 1905, sec. 54, p. 1175.)

The same act provides that a foreign insurance company on coming into this state must make a statement of "the number of shares of stock of every kind owned by it, the par and market value of the same," (Hurd's Illinois Statutes, 1905, sec. 40, p. 1170).

Section 186 of chapter 73 (1869) declares that every life insurance company must include in its annual statement the "Number of shares owned in any railroad, stating the corporate name of each and the amount invested in each, at cost, on its books;" (Hurd's Illinois Statutes, 1905, p. 1205).

In section 191 of the same chapter it is said: "It shall be lawful for any (life insurance) company organized in this state, to invest its funds or accumulations in the stocks of the United States, or of this state, or of any city or town in this state, or in any national bank, or in such other stocks and securities as may be approved by the auditor * * *" (Hurd's Illinois Statutes, 1905, p. 206.)

The Act of 1883 declares that every foreign insurance

company upon coming into the state shall include in its application "the number of shares of stock of every kind owned by it, the par and market value of the same, * * *" (Hurd's Illinois Statutes, 1905, sec. 40, p. 1170).

By the Act of 1877 each Illinois trust company must show in its annual statement "The amount of stocks and bonds of this state, and of the United States, of any incorporated city of this state, and of any other stocks and bonds owned by such company, * * *" (Hurd's Illinois Statutes, 1905, sec. 137, p. 540).

The Act of 1893 (amended 1897) declares that any mining or manufacturing company of this state shall have the power to "own and hold shares of the capital stock, and to own and hold securities of any railroad company, * * *" when such roads connect the different plants with each other or with other railroads. (Hurd's Illinois Statutes, 1905, sec. 148, p. 542.)

The Act of April 17, 1899, provides that surety companies may invest in the same securities as life insurance companies are empowered to buy and hold. (Hurd's Illinois Statutes, 1905, sec. 102, j, p. 532.)

The Act of June 7, 1899, declares that every accident insurance company incorporated in or doing business in this state, shall include in its annual statement the "Number of shares owned in any railroad, * * *" (Hurd's Illinois Statutes, 1905, sec. 218, p. 1212).

It would seem from these statutes that there was no public policy in this state forbidding a corporation either domestic or foreign (foreign railroad companies not now being considered) from investing its surplus funds in the stock of another corporation. On the contrary such power is recognized or expressly granted in the acts cited. It is only when such investment is made for an unlawful purpose, such as to prevent competition, or to create a monopoly that the law forbids the same. Whether the power exists in any corporation to buy and hold the stock of another company depends on the charter of the purchasing company and on the law under

which it is created. Given that power there is no statute in this state which forbids its exercise. It should be noted that in several of these acts shares of stock in railroad corporations are specifically mentioned as proper stocks for investment. All the corporations referred to in the various acts cited were granted or had other powers than that of investment. But that fact is immaterial. If the power to invest be unlawful when it is the only power granted, it is unlawful when added to other powers. Such is the distinct ruling in *Stevens v. Pratt*, 101 Ill. 206, where the only power granted to the United States Mortgage Company, a foreign corporation, was to loan money. This fact was pointed out by counsel with the further fact that the Illinois corporations to whom this power of investment was given had also other powers, such as the power to insure, to act as surety or as trustee, to mine or manufacture and the like. The supreme court sweeps this argument aside, saying among other things: "Can it possibly make any difference to the sovereign state of Illinois, or to any of its citizens, whether a foreign corporation, which comes here to loan its money, has power by its charter to effect insurance, as well as to loan money, or whether it has power merely to loan money? Is there anything in the exercise of this power by a corporation which is affected by the additional powers possessed by the corporation, or by the fact whether or not it has additional powers? Until it can be demonstrated that the possession of the additional powers can, in some substantial way, affect the loan, we must hold that it can make no difference whether the corporation be authorized to bank, or effect insurance, *or build railroads*, as well as to loan money, or whether it is authorized to effect loans, solely." (p. 228.)

What is shown by the statutes of this state concerning foreign railroad companies?

The Act of 1855 authorized all domestic railroad companies to make, with any other domestic railroad, or with "railroad corporations of other states," any arrangement "for leasing or running their roads, or any part thereof, * * * as shall be necessary and convenient for carrying into effect

the object of this act;" and it gave them the right to connect with each other "and with the railroads of other states, on such terms as shall be mutually agreed upon by the companies interested in such connection." (Hurd's Illinois Statutes, 1905, p. 1573, pars. 44, 45.)

In *The Illinois Midland Railway Co. v. The People*, 84 Ill. 426, it was held under this act, that a plea to an information in the nature of a *quo warranto*, charging one railroad company with usurping the powers and franchises granted to another, which sets up a contract between it and the other company, authorizing it to operate the road of such other company, and that it is operating the road under such contract, is a good plea. (429.)

The Act of 1875 enlarged the Act of 1855 by authorizing all domestic railroad companies and all railroads of "any adjoining state," when in possession of or operating connecting railroads "under lease in perpetuity or for a period of not less than twenty years" to purchase or sell the remaining interests of the leased road. (Hurd's Illinois Statutes, 1905, p. 1573.)

In 1873 an act was passed permitting domestic railroad corporations to consolidate with each other, under certain conditions and restrictions. Under this act any two domestic railroad companies where their lines are connecting and not parallel or competing may consolidate. (Hurd's Illinois Statutes, 1905, p. 509.)

By an act passed in 1883, it is provided that where a railroad situate partly in this and partly in another state and heretofore owned by a corporation formed by consolidation of railroad corporations of this and other states, has been sold under decree of court and has been purchased as an entirety and is now held by two or more corporations of two or more states, it shall be lawful for the domestic corporation to consolidate its property, franchise and capital stock with the property, franchises and capital stock of the foreign corporation upon such terms as may be agreed upon. (Hurd's Illinois Statutes 1905, p. 1572, sec. 39.)

The Act of 1885 provides that all domestic railroad compa-

nies "which now are, or hereafter may be in possession of, and operating in connection with, or extension of their own railway lines, any other railroad or railroads, in the state or in any other state or states, or owning and operating a railroad which connects at the boundary line of this state with a railroad in another state," may purchase such other railroad property with its corporate rights and franchises. (Hurd's Illinois Statutes, 1905, p. 1606.)

In 1893 an act was passed authorizing railroad companies, in consolidating so as to form an interstate line, to fix the terms of such consolidation, which terms may be the payment or retirement of the preferred stock of the companies and the issue of new preferred stock. (Hurd's Illinois Statutes, 1905, sec. 42, p. 1573.)

By the Act of 1897 all agreements, purchases and sales made by and between domestic railroad companies and foreign railroad companies between July 1, 1874 and July 1, 1893, were ratified, approved and confirmed. (Hurd's Illinois Statutes, 1905, sec. 198, p. 1607.)

Section 14 of chapter 114, being the general act relating to the incorporation of domestic railroad companies, provides that "it shall not be lawful for such corporation to use any of the funds thereof in the purchase of its own stock, or that of any other corporation, or to loan any of its funds to any director or other officer thereof, or to permit them or any of them to use the same for other than the legitimate purposes of the corporation;" *Provided*, that any domestic company whose road connects with any railroad of any other state, "shall have power * * * to own and hold the stock and securities" of such connecting road; "such ownership or holding to comprise at least two-thirds in amount of the stock of such corporation." (Hurd's Illinois Statutes, 1905, p. 1567.)

The Act of 1899 declares that whenever any foreign corporation shall be in possession of any railway situate in Illinois belonging to a domestic company, or shall own or control all the capital stock of such domestic corporation, "then the corporation of this state may sell and convey, and such cor-

poration of another state * * * may purchase an * * * of such railroad" with all its rights, franchises and privileges and forever use and enjoy the same, under prescribed terms. (Hurd's Illinois Statutes, 1905, p. 1611.)

It is shrewdly inferred by counsel for complainants that some of these acts were passed to fit special cases. In one or more instances this inference is verified by the railroad history of this state. Though this be true yet these several acts are public laws of this state, which may be taken advantage of in similar cases, and which may be examined in the effort to ascertain what is and has been the public policy of this state upon the main question here in issue.

A review of these acts show that the uniform public policy of the state of Illinois has been and still is to encourage the building and maintenance of railway lines for the transportation of goods and of passengers. The power to lease, to enter into operative contracts, to consolidate connecting lines, to buy and to sell, has been freely granted; and it also shows that the public policy of the state is opposed to and forbids the union or consolidation of parallel or competing lines.

The Act of 1899 assumes and recognizes the right of a foreign railroad corporation, having the power by its charter to purchase the stock of other corporations, to buy and hold stock in an Illinois railway corporation. It says that whenever any foreign corporation "shall own or control all the capital stock of such corporation of this state, then the corporation of this state may sell and convey," etc. These are not words of grant or of authority, but are words recognizing the existence of a right of power in the foreign corporation.

Chapter 114 by its terms relates to the domestic railroad corporations formed under the act. It does not concern itself with foreign railroad corporations. Section 14 of that act declares how the funds of the domestic corporation may not be employed. It prohibits the use of such funds in the purchase of the stock "of any other corporation." The question of restricting the investment of the funds of a foreign corporation was not before the legislature, and this section,

even by implication, does not lay down any rule in relation thereto. It was and is a matter of concern to the lawmaking power of this state as to the manner of the investment of the funds of its own corporations; but it has no such concern as to the investments of foreign corporations, whether they build and operate railroads, or sell life or fire insurance, unless such investments are made or are used for an unlawful purpose, such as the preventing of competition, or the creation of a monopoly or a perpetuity. The *proviso* to this section grants to a domestic railroad the power to own "the stock and securities" of any connecting railroad. The fact it also provides that the purchasing company shall acquire at least two-thirds of the stock of the railroad in which it invests, does not take away the power to purchase, but does require the purchase of two-thirds thereof before such owning and holding shall entitle the investor to take over the other road.

The Act of 1905 is entitled "An Act to regulate the admission of foreign corporations for profit, to do business in the State of Illinois."

In this act it is provided that no foreign corporation can be admitted "to transact any business, or exercise any of its corporate powers" in Illinois until it complies with its conditions; that no foreign corporation can be admitted to do business in the state "for the transaction of which a corporation cannot be organized under the laws of this state," and that the act shall be construed not as a grant of power, "but as a limitation upon interstate comity." (Hurd's Illinois Statutes, 1905, p. 512, secs. 67*b* to 67*j*.)

Concerning this act complainants counsel say: "To hold and vote stock in an Illinois corporation is, we concede, not a doing of business in the state within the meaning of the Act of 1905, so as to require the formalities of that Act to be complied with as a condition precedent to the right to own and vote." (Brief, 108.) It appears in this case that the only act the Securities Company or the Union Pacific ever did, or now desires to do in this state, is to vote the stock they hold in the Illinois Central, at stockholders' meetings.

Section 4 of this Act closes with the words: "Nor shall this act be construed as a grant of power to any corporation admitted hereunder but as a limitation upon interstate comity"— But how can these words which concern no other corporations than those "doing business" in the State, apply to corporations which confessedly are not included in the act?

I do not find in any of these acts, relating to domestic corporations or to foreign corporations, a declaration that foreign corporations, including railroad corporations, may not buy, own and hold the stocks of domestic corporations; or, that having such ownership, they may not exercise all of the rights and privileges inherent in and necessary to full ownership. Nor have I been referred to any Illinois decision, nor has any come to my knowledge, declaring that such investments are against the public policy of the state. The right of the lawful owner of such stock to vote it at meetings of the stockholders should not be denied in the absence of a clear prohibition contained in the statutes of the state or to be found in some decision of our supreme court.

It is a matter of common knowledge that for years foreign corporations, including railway corporations, have been large purchasers and holders of stock of many of our domestic corporations, including domestic railway corporations. The annual statements of such holding corporations, in the many cases in which such statements are required by law, have shown this ownership. The yearly reports of the Railroad and Warehouse Commission set forth the income of all railroads from stocks of domestic corporations severally owned and held by them. The governor of this state is *ex officio* a director of the Illinois Central, upon whose books for the last seven years the Securities Company has stood registered as the owner of 80,000 shares of its stock. In these and in so many other ways has such ownership been published to the world that the knowledge of it may be deemed to be almost universal; and yet it does not appear that the executive department of the state by any legal proceeding has ever questioned the right or power of any foreign corporation, having

such express power given it by the state of its creation, to buy, hold and vote the stock of any domestic corporation. The executive department is neither ignorant nor careless. This silence must proceed from the belief that such holdings are *intra vires*, and are not prohibited nor opposed to public policy.

Investment companies are of two classes—the one, while exercising other powers, which form the main reason for its creation, purchases the stock or bonds of other corporations in order that its idle capital necessarily held for the payment of obligations not yet matured or of betterments not yet made, in the waiting interval, may bear interest. Of such a life insurance company is an example. The other with its own stock or money, and as its main business, buys stocks and bonds of other corporations and holds them either in the form received or in some modified form. The interest upon the bonds and the dividends upon the stock thus held constitute its profits. The Securities Company is an example of this latter class. There is nothing illegal nor against public policy in either of these forms. It is only when such a corporation is formed or is used for some unlawful purpose which stifles competition, or creates a monopoly, or establishes a perpetuity, or directly tends to bring about any of these things, and such intention is pleaded and proved, that the courts will suppress or right the wrong and will punish the offender. No corporation, however broad are its granted powers, is authorized to exercise these powers in any mode which the law of the state would not justify in any private person or in any unincorporated body. *Oregon Railway and Navigation Co. v. Oregonian Railway Co.*, 130 U. S. 1, 26.

The Railroad Securities Company is an investment or holding corporation of the state of New Jersey, clothed with power to purchase, receive, hold and own bonds, mortgages, debentures, notes, shares of capital stock, and other securities of any railroad company or other public service corporation, with all the rights, powers and privileges of the individual ownership thereof, including the right to vote thereon.

In 1900 the Securities Company purchased 80,000 shares of the capital stock of the Illinois Central. It still owns this stock. No question is raised in this case but that the several grantors had title to the stock they then sold to the Securities Company, nor is it questioned but that such purchases transferred to the Securities Company all the property rights in said stock theretofore possessed by such vendors. After it became the owner of this stock the Securities Company surrendered the original certificates therefor to the Illinois Central, and new certificates were issued by the latter company to the Securities Company in its name for a like amount; and thereupon the Illinois Central registered upon its books the Securities Company as the owner and holder of said 80,000 shares of stock, and such registration still stands. All these matters were participated in by Mr. Fish. It was not until the sale of his stock in that company in 1906 to the Union Pacific, that he lost his interest in the Securities Company. At each succeeding annual election until 1907, without protest or question by any one, the Securities Company voted this stock, by its proxy Mr. Fish, not only for the election of directors, but also upon all contracts which the shareholders were called upon to confirm or to reject. In 1901 the Securities Company pledged this stock with the U. S. Trust Company to secure its outstanding bonded indebtedness in the sum of \$8,000,000, but retained its right to vote said stock. It is and has been the owner and holder of no other railroad stock. About one year ago the Union Pacific, which theretofore was a large holder of the stock of the Securities Company, by additional purchases became the owner and holder of all the stock of that company except 45 shares in the hands of its directors. It is not contended that the Securities Company is about to vote its stock for any unlawful purpose; but it is contended by the complainants that as the Union Pacific now owns and controls all (or practically all) of the stock of the Securities Company, the latter disappears as a factor in this case; and that if the Union Pacific, on grounds of public policy, cannot directly hold or vote stock in the Illi-

nois Central, it cannot do so indirectly through a holding company of which it is the sole stockholder. If the purchasing company has no power to buy, hold and enjoy the stock it purchases, then whether it buy stock in its own name or through the intervention of individuals or trustees the want of power is the same. (*Dunbar v. American Telephone & Telegraph Co.*, 224 Ill. 9, at p. 26.)

To sustain its contention complainants cite the following cases:

In *Stockton v. Central Railroad Co. of New Jersey*, 50 N. J. Eq. 52, 24 Atl. 964, the Philadelphia & Reading Railway Company, a foreign corporation, had no power to lease the Central Railroad. To accomplish its purpose it promoted the creation of a domestic company, having that power, and the lease was thereafter made to such domestic company. The court looked through this device and declared the lease void. (p. 745.)

The *Central Railroad Co. of New Jersey v. Pennsylvania Railroad Co.*, 31 N. J. Eq. 475, is a like case, and a like result was reached.

State v. Standard Oil Co., 49 Ohio St. 137, 30 N. E. 279. The case was a *quo warranto*, and the act done was *ultra vires* the corporation and against public policy, being in restraint of competition. The court held that where all the stockholders joined in the doing of the act and it called for corporate action it should be considered the act of the corporation.

People v. North River Sugar Refining Co., 121 N. Y. 582, is similar to the last case.

In *United States v. Milwaukee Refrigerator Transit Co.*, 142 Fed. 247, the proceeding charged was an attempt to secure rebates in violation of the Inter-State Commerce Act, and the Transit Company was created by the Brewing Company to accomplish this purpose. On demurrer the court held the bill good.

Southern Electric Securities Co. v. State, 44 So. 785 (Miss.), is like the last in that the object sought to be obtained was

unlawful and the restrained company had been created to carry out this design.

In *Ford v. Chicago Milk Shippers' Association*, 155 Ill. 166, it appeared that a corporation had been formed to control the sale and price of milk in Chicago. The court says: "And where, in the organization of the corporate body or the control exercised by the stockholders in determining the agencies selected for managing its business, the business as thus conducted, managed and controlled is against public policy or in contravention of a statute of the state, such acts of the corporate body and of the individual shareholders are the combined acts of all, and courts are not so powerless that they may not prevent the success of ingenious schemes to evade or violate the law." (p. 180.) The statutes of Illinois permitted a private person to bring the action.

It will be seen in each of these cases that the action was brought by the state or under a special statute; that the act done or attempted to be done was in itself unlawful; and that the corporation was created for the purpose of doing the illegal act, or had directly participated in the doing of it. When these facts had been alleged and proven the court disregarded the corporate entity in order to get at the substance of the unlawful thing that it might prevent the wrong and punish the wrongdoers. In the case at bar the Securities Company was lawfully organized for a lawful purpose; it owned the stock and had a right to vote it, and it was not a party to the transaction by which it is claimed it lost its right to vote the stock.

By the express terms of its charter the Securities Company has the right to buy, hold, own and vote the stock of other corporations of a public service character, in the state of its creation and elsewhere. In New Jersey its ownership of such stock as it purchased, with all the rights which follow absolute ownership, is not, and cannot be questioned.

Viewed in the abstract, the question as to who owns the stock of a corporation, whether that ownership be individual or corporate, by one or by many, is immaterial. In each and

every case the officers and directors of the corporation control its policy and its property. The ownership of its property is as firmly fixed in the corporation when all its stock is massed in the hands of one stockholder, as it is when such stock is distributed among a thousand holders. The greater or lesser number of its stockholders does not impair or take from it any of its rights or properties. The title of a corporation to its property and the enjoyment of all the rights going with and making up that title cannot be taken away by showing that any or all of its stockholders had no power to exercise such rights.

In *Hopkins v. Roseclare Lead Co.*, 72 Ill. 373, appellees, a corporation, claimed to own a 99-year lease of certain mineral lands. This lease had been regularly transferred to the appellee company; afterwards one LaGrave, a large stockholder in the company, executed instruments purporting to convey the said lease and other rights and property to said Hopkins. The supreme court reversed the cause for want of proper parties defendant, but in the opinion say:

"It is insisted that LaGrave had no power to make the sale of the leases, to transfer the control of the suit, or to sell the 20 acres of land, as they were all owned by the company. He was but a stockholder, and as such had no power to make the sale. He, although owning the majority of the stock, could not act for the company, unless specially authorized. He could no doubt control the action of the company by the election of its officers, but still the company could only act through its officers, or by expressly delegating power to others, whether a stockholder or other persons." (p. 379.)

In *Sellers v. Greer*, 172 Ill. 549, two stockholders who owned all the stock of a corporation (except two shares, held by their sons, for which the sons paid nothing), attempted to divide and to dispose of the corporate property. It was held that they had no power to do so. "A corporation is an artificial being created by law, clothed with certain powers. It acts through its board of directors and officers. Its property is not subject to the control or disposition of its members

or stockholders." This holding is sustained by many authorities cited. (pp. 553 *et seq.*)

In *Coal Belt Electric Railway Co. v. Peabody Coal Co.*, 230 Ill. 164, all the stock of the appellant company was purchased by George J. Gould. As to this phase of the case the court say: "By its purchase Mr. Gould did not acquire the ownership of the property of the railway company. The ownership of that property remained in the Coal Belt Electric Railway Company as before, unaffected by the sale. Mr. Gould merely became a stockholder of the railway company but not the owner of its property in a legal sense, though he could control its action by the selection of its officers. (*Humphrey v. McKissock*, 140 U. S. 304; *Sellers v. Greer*, 172 Ill. 549; 2 Cook on Stock and Stockholders, sec. 709.) After the transfer of the stock the Coal Belt Electric Railway Company sustained the same relation to its property as before. It neither acquired nor lost any right, by estoppel or otherwise, for it was no party to the transaction."

(See also *Ulmer v. Lime Rock Railway Co.*, 98 Me. 579, 594, 57 Atl. 1001; *Oregon Short Line Co. v. Postal Telegraph Cable Co.*, 111 Fed. 842, 844, 845; *Commonwealth v. New York Ry. Co.*, 132 Pa. St. 591, 19 Atl. 291.)

The right of the Securities Company to vote this stock stands uninfluenced and unimpaired by the fact that the Union Pacific owns all or practically all its stock. So long as the voting power of the Securities Company is used by its officers and directors in a lawful manner, and for lawful purposes, it is immaterial who owns its stock. As an independent corporation it holds its stock and other assets not only for the benefit of its stockholders, but also for the benefit of its certificate holders, who are vitally interested in the 80,000 shares of stock held by the Trust Company.

The Act of 1905 has no application to the Securities Company. A careful inspection of the language of the Act will lead to the conclusion that it was intended to take effect upon causes of action and demands arising after its passage, and upon none other. Statutes are prospective, and will not be

construed to have a retroactive operation unless the language employed is so clear that it will admit of no other construction. Retrospective laws are not looked on with favor. (*People v. McClellan*, 137 Ill. 352; *Richardson v. United States Mortgage & Trust Co.*, 194 Ill. 259; *People v. Hummel*, 215 Ill. 43, 46.)

Again: The right to vote this stock accrued to the Securities Company when it became the owner of the stock in 1900. To impair this right by force of a subsequent statute is forbidden by section 10 of article 1 of the constitution of the United States, and by section 14 or article 2 of the constitution of the state of Illinois.

I am of opinion that a valid corporation, similar to the Securities Company, can be formed under the Illinois statutes.

Section 1 of the General Incorporation Act declares: "That corporations may be formed in the manner provided by this Act *for any lawful purpose*, except banking, insurance, real estate brokerage, the operation of railroads and the business of loaning money."

Section 5 says that "Corporations formed under this Act * * * may own, possess and enjoy so much real and personal estate as shall be necessary for the transaction of their business, and may sell and dispose of the same when not required for the uses of the corporation * * * and may have and exercise all the powers necessary and requisite to carry into effect the objects for which they may be formed."

Is the purpose for which the Securities Company was formed a "lawful purpose" under this Act?

The buying by one corporation of stock of another corporation is not *malum in se*. It does not come within any of the exceptions named in the Act. The legislature of this state, in a series of acts extending over many years, has granted to fire insurance companies, to life insurance companies, to mining and manufacturing companies, to gas companies, to accident insurance companies, to trust companies, and to railroad companies the power to buy, own, hold and enjoy stock of other corporations. If the granting of this power is

unlawful in this state, these acts would not have been passed, or, if passed, would have been condemned by the courts.

“Where the statutes of a state authorize incorporation for any legal purpose, incorporation can be had for buying and selling shares of stock in other corporations.” (1 Cook on Corporations, sec. 316, p. 691.)

In each of the following cases (which I cite without going into details) the local statute was similar to that of this state; and in each it was held that a corporation could be formed for the purpose of buying and selling shares of stock in other corporations. *Market Street Ry. Co. v. Hellman*, 109 Cal. 571, 590, 42 Pac. 225; *Vokes v. Eaton*, 119 Ky. 916, 85 S. W. 174; *York Park Bldg. Assn. v. Barnes*, 39 Neb. 834, 839, 58 N. W. 440; *State v. Minn. Thresher Mfg. Co.*, 40 Minn. 213, 223, 41 N. W. 1020.

If, however, it be admitted that a corporation like the Securities Company, having the express power to buy, hold and vote the stock of other corporations, cannot be formed under the laws of this state, this fact alone does not indicate a public policy against such a foreign corporation exercising that power in the state of Illinois. (*Stevens v. Pratt*, 101 Ill. 206; *People v. Fidelity Ins. Co.*, 153 Ill. 25.)

The Union Pacific and the Illinois Central are not parallel or competing lines, but are connecting lines. The former comes east from Utah to Omaha, and there ends. The latter starts from Omaha and comes east to Chicago, and then runs south to New Orleans, where it connects with the Southern Pacific. Granting the contention of complainants that the Union Pacific virtually controls the Southern Pacific, these roads are still connecting lines, and are not parallel nor competing lines with the Illinois Central. The court, with other facts, will take judicial notice of geographical facts in determining whether two railroads are parallel and competing, either in the geometrical sense or in the larger business and financial sense. (*Illinois State Trust Co. v. St. Louis Iron Mountain & So. Ry. Co.*, 217 Ill. 504.

The Union Pacific, under its charter and the laws of Utah,

has a clear right to own and hold shares of stock of the Illinois Central which it purchased in 1906. By the laws of comity it had the right, which is an essential part of that ownership, to vote that stock at the meetings of the stockholders of the Illinois Central, unless such right is forbidden by the statutes of this state or by the public policy of this state. Such prohibition does not exist unless it affirmatively appears. It is not established by the mere lack of legislation upon that subject.

The stock so held by the Union Pacific was bought and paid for by it in the state of New York, and in that state such stock was registered by the Illinois Central upon its stock books. No act relating to that stock was ever done in this state by the Union Pacific, and it intends to perform no act in Illinois except to vote that stock if it may do so.

Much that has been said concerning corporations, the statutes of this state and the decisions of our supreme court is of equal force when applied to the Union Pacific as it is to the Securities Company, and therefore need not be repeated.

Upon the questions here involved the case of *Stevens v. Pratt*, 101 Ill. 206, has an important bearing, and I therefore quote from it somewhat at large. The action was ejectment. Appleby was the common source of title. In April, 1873, he mortgaged real estate to the United States Mortgage Company to secure the payment of \$5,000. In September, 1873, he again mortgaged the same property to secure the payment of \$2,000. Appellee claimed under the former mortgage, and appellant under the latter mortgage. Appellant asserted that the note and mortgage given to the Mortgage Company were void. The trial court held otherwise. On appeal the supreme court discuss but one question, namely, whether the acts of the Mortgage Company in loaning its money to Appleby and taking from him his note and mortgage therefor were void. They say: "These acts involve no moral turpitude, and they are, in no sensible degree, detrimental to the public welfare, and the only ground upon which their invalidity is claimed is, that the company, as a foreign

corporation, created solely for the purpose of loaning money, can have no legal existence, and hence can do no act forming the basis of a legal right, in this state." (p. 211.) The court then re-examined the grounds upon which it decided the case of the *United States Mortgage Company v. Gross*, 93 Ill. 483, and overruled that case.

The court holds that the first section of the General Corporation Act does not show it is a part of the policy of the state that corporations should not be formed in the state for the business of loaning money. "It is not said, nor is it the reasonable implication, that the corporations excepted may not be formed *under other acts*. Indeed, the implication is directly the reverse, for the business of the excepted corporations, by the proper construction of the language employed, is called 'lawful,' and there can, in the absence of unmistakable language, be no presumption of exclusion of that which is 'lawful,'—that is to say, which has the sanction or permission, and is consequently entitled to the protection of the law." (p. 215.)

"It is true *that act* provides for only certain corporations, and gives no right to incorporate for other purposes, and from this there may be an implication that the legislature would not grant the right to be incorporated for the excepted purposes, *in the same manner*, and subject to the *same regulations and restrictions*, but it is not, therefore, to be assumed that the legislature was unwilling to grant the right to be incorporated for the excepted purposes, *in another manner, and subject to other regulations and restrictions*. From the different natures and purposes of the excepted corporations reason exists why different and more stringent restrictions should be thrown around them; but in such a country as ours, the public welfare demands that they be allowed to be created, under proper and wise safeguards for the protection of the public, and not that they be absolutely prohibited." (pp. 215, 216.)

"On further consideration and reflection, we are convinced we also erred in holding that the first sentence of section 26

of that law manifests a policy that foreign corporations were to have no right to loan money in this state? That sentence does not say that no foreign corporation except those of like character as are provided to be formed under that act, shall be allowed to do business in this state. It does not assume to define what foreign corporations shall be allowed to do business in this state, but simply to impose regulations and restrictions upon certain named classes or kinds of foreign corporations doing business in this state,—that is, those of like character as it is provided may be formed under that general law. Its exact words are, 'foreign corporations and the officers and agents thereof, doing business in this state,'—(that is, that *are doing* business, not that shall hereafter *be allowed* to do business in this state) 'shall be subject to all the liabilities, restrictions and duties that are or may be imposed upon corporations of like character organized under the general laws of this state, and have no other or greater powers.' The language is entirely that of regulation and restriction, and not that of grant or prohibition. No corporation is granted the right to do business in the state. No corporation is excluded from doing business in this state." (p. 216.)

"The manifest and only purpose was to produce uniformity in the powers, liabilities, duties and restrictions of foreign and domestic corporations of like character, and bring them all under the influence of the same law." (p. 217.)

"No unfavorable inference can be drawn from the failure of the legislature to enact laws upon the subject." (p. 218.)

"What was in the legislative mind when this general law was enacted? Manifestly only the classes of corporations anticipated to be created under its provisions, as defined in section 1. * * * They were providing for certain corporations, leaving others unprovided for, and so what they did not provide for is not affected by the legislation they enacted, whether we regard domestic or foreign corporations. The excepted corporations and foreign corporations of like character, are simply unaffected by this law." (p. 219.)

"We concede that all foreign corporations might have

been prohibited from doing business in this state except those of like character as contemplated to be organized under the provisions of this act, but then it would have been very easy to have said so in unmistakable terms, and we do not feel warranted in assuming, from the absence of language, or from even (if it were to be found) ambiguous language, that a policy has been adopted so repugnant to the business welfare of our citizens, and so wanting in that spirit of comity which should characterize the conduct of the sister states towards each other." (p. 219.)

The court reviews the Illinois cases cited by appellant, and then cites decisions from the United States courts sustaining its position; and refers to many private acts of this state granting to domestic corporations the power to loan money and to take real estate security therefor as indicating the policy of the state in this regard; and holds that if the policy of the states does not permit the business of the foreign corporation in its limits, that policy must be expressed in some affirmative way,—it cannot be affirmed from the fact that the legislature has made no provision for the formation of similar corporations, or allowed corporations to be formed only by general laws. Accordingly the court sustains the validity of the first mortgage.

This case clearly shows that section 26 does not apply to foreign corporations engaged in the "business of loaning money." It follows logically and is beyond question that the same rule applies to foreign railroad corporations, and that they are not bound by the restrictions placed upon domestic railroad corporations. This case has never been departed from by our supreme court.

Complainants assert from the fact the Union Pacific owns twenty-five per cent. of the capital stock of the Chicago & Alton Company, a road which is a parallel and competing line with the Illinois Central, both being corporations of Illinois, that the attempt of the Union Pacific to acquire stock in the Illinois Central is *ultra vires* and void under the laws of this state.

It is not claimed that there has been any limitation of com-

petition between the Alton and the Illinois Central by reason of such ownership, but it is said that such holding may tend to that result.

It appears in this case that more than fifty per cent. of the stock of the Alton is owned by the Toledo, St. Louis & Western Railroad Company, called the Clover Leaf, a corporation wholly independent of the Union Pacific, thus giving the Clover Leaf absolute and permanent control of the Alton; and that whatever control of the Alton was once had by the Union Pacific has passed from it.

In *Northern Securities Company v. United States*, 193 U. S. 197, that company was in control and management of the

NOTE.—In the case of *Chicago Real Estate Loan & Trust Co. v. Corn Products Co., et al.*, in the United States Circuit Court for the Northern District of Illinois, Eastern Division, Gen. No. 28,695, a cross-bill was filed by one of the defendants to cancel complainant's stock in the Corn Products Company on the ground that the complainant was an Illinois corporation and could not, therefore, own stock in another corporation. A demurrer was filed to this cross-bill. On March 5, 1908, Judge Landis in an oral opinion referred to the above opinion of Judge Ball, and said:—

"In the case of the Corn Products Company, as I have already intimated, I have no doubt whatever that as a legal proposition the complainant cannot hold the stock under the laws of Illinois. The situation would be different in case of a railway corporation—the statute which I have in mind mentions railway corporations. I suppose you gentlemen are both familiar with that statute which was passed a number of years ago. It is general in its terms and provides that if a foreign railway company shall become the owner of a certain amount of stock in an Illinois railway company, the foreign railway company by doing certain things may become the owner of the property of the Illinois railway company through the portion of the stock of which the foreign corporation has already possessed itself. I take that statute to be declaratory. I have read Judge Ball's opinion with respect to railway corporations.

"Railway corporations, however, have always been regarded by the law as being in a different class from general commercial corporations. The state of Illinois has one policy in respect to railway corporations and another policy in respect to commercial corporations. I believe nearly every state does have a different policy. In this case, the state has in my view a policy against investments by these corporations of the funds of that corporation in the stock of other corporations. The demurrer will be overruled."—Ed.

Northern Pacific and of the Great Northern, which were competing roads from the Lakes to the Pacific Ocean. It owned more than nine-tenths of the stock of the Northern Pacific and more than three-fourths of the stock of the Great Northern. It was formed by the stockholders of both roads for the purpose of running these competing and parallel roads under one management, "as held in one ownership." The Attorney General of the United States brought a suit in equity to enjoin the holding company from voting such stock, and from exercising any control whatever over the acts and doings of the railroad companies, and also to enjoin the railroad companies from paying any dividends to the holding company on any of the stock held by it.

Upon appeal, counsel for the Northern Securities Company argues that there were other carriers within that territory, and therefore the monopoly could not be complete; and that competition in fact had not been lessened. In answer to this argument the court said: "To vitiate a combination, such as the act of congress condemns, it need not be shown that the combination in fact results or will result in a total suppression of trade, or in a complete monopoly, but it is only essential to show that by its *necessary* operation it *tends* to restrain interstate or international trade or commerce, or tends to create a monopoly in such trade or commerce and to deprive the public of the advantages that flow from free competition." (p. 332.)

Such is not the case here,—there has been no suppression of trade. There has been no monopoly. So far as the Union Pacific has gone it has not control of either road. The effect of the argument is that if a corporation cannot lawfully acquire a majority of the stock of each of two competing roads, the direct result of which is to create a monopoly or to stifle competition, it cannot acquire any stock, say ten shares, in each of these roads. I do not think this is the law. In the subsequent case of *Harriman v. Northern Securities Company*, 197 U. S. 244, the court passed upon the disposition of the stock held by the Northern Securities Company. It

refused to order the sale of the stock, which was the only logical thing to do if such holdings were absolutely void, because of the financial distress arising from suddenly putting such great blocks of stocks upon the public market. It refused to give the complainants the stock they had put into the combination, since that would give the Union Pacific a majority of the stock of the Northern Pacific, which would be contrary to public policy. It did give, however, to the Union Pacific twenty-one per cent. of the stock of the Northern Pacific, and nineteen per cent. of the stock of the Great Northern. It would not have made this distribution had it been contrary to the statutes of the United States or of public policy for one railroad to hold a minority of the stock of two competing railroads at one and the same time.

The illegality of such purchases does not begin until the holding is great enough "that by its necessary operation it tends to restrain" trade or to create a monopoly "and to deprive the public of the advantages that flow from free competition."

The usual office of a preliminary injunction is to continue the *statu quo* until the final hearing. Upon the determination of this question, unless the right of the complainants to have the injunction retained is clear, the balance of convenience and inconvenience to the parties litigant has a potent influence. To sustain this preliminary injunction, and thus to prevent the Union Pacific and the Securities Company from voting the stock they severally hold out at the coming election would be to change the *status quo* before the right of these corporations to own and to vote such stock has been fully and finally determined by the court. With these corporations barred out, the result of the meeting, by the vote of a minority of the stockholders, might be an entire change in the management and in the control and operation of the Illinois Central. To dissolve this injunction and to let the action of the court in regard to the ownership and voting power of this stock await the final hearing, means no more than the continuance of the present management, with the

change of one director only, and he, eight of the director defendants swear, and the answer of the Union Pacific asserts, will be an able, competent man, not under the control of or connected in any way with the latter corporation. The balance of convenience and inconvenience is clearly with the defendants.

I am of the opinion that the Securities Company and the Union Pacific have full ownership of the shares of stock they severally claim to own and hold in the Illinois Central, including the right to vote that stock at the coming stockholders' meeting of the latter corporation; and that such right to vote is not forbidden by the statutes of this state, nor by the decisions of our supreme court, nor by the public policy of Illinois.

Therefore, the motion to dissolve the injunction is allowed.

(Circuit Court of Cook County. In Chancery.)

Albert F. Lunt

vs.

Laura Marshall Lunt.

(May 20th, 1902.)

1. SERVICE BY PUBLICATION—EQUIVALENT TO PERSONAL SERVICE—
WHETHER DEFENDANT IN DIVORCE PROCEEDINGS BOUND BY DECREE.
Where the defendant in a divorce proceeding is served by publication, and receives the notice of publication by mail, he has had his day in court, and is bound by the decree of the court.
2. DIVORCE—OBTAINED BY NON-RESIDENT—RIGHT OF DEFENDANT TO SET ASIDE BY BILL OF REVIEW WHERE COURT IMPOSED UPON.
Where a person obtains a divorce and the court is made to believe that such person is a resident of Illinois the defendant is permitted on the ground of public interest to file a bill of review and have the decree vacated.
3. DOMICILE—WHAT CONSTITUTES—INTENT. The question of what constitutes the domicile of a person is largely a question of intention.

4. **SAME—SHOWN TO EXIST IS PRESUMED TO CONTINUE.** Where a particular domicile is shown to exist it is presumed to continue unless changed by clear and satisfactory evidence.
5. **SAME.** Evidence reviewed as to whether party had changed her domicile.

Bill of review to review divorce proceedings. Heard before Judge Murray F. Tuley. The facts are stated in the opinion.

J. F. Richards, for complainant.

J. B. Brady, for defendant.

TULEY, J. (orally) :—

This is a bill filed by Albert F. Lunt, complainant, against Laura Marshall Lunt, defendant. It is a bill of review, strictly speaking, and the only issue made by this bill is that of the residence of the present defendant (then complainant), at the time of the commencement of the divorce suit in which the decree was entered, which is sought to be reviewed. It is necessary under the statutes of this state, that every complainant in a divorce suit shall have resided within the limits of the state of Illinois for one year prior to the commencement of the suit. The divorce suit was commenced the last day of December, 1895. The evidence shows that publication was made as to the defendant in due form, that he received the notice of publication sent to him by the clerk; that he wrote to an attorney in this city concerning the suit; that he made no appearance, and that on the 11th day of March, 1896, default having been entered, evidence was heard and a decree of divorce pronounced upon the ground of desertion. He was telegraphed to, either the same day or the next day after the decree was entered, he, the husband, being then a resident of Boston, I believe.

Inasmuch as the notice was received by the defendant in that case (which under our statute was equivalent to personal service) he could have no standing in a court of equity to review the facts upon which the decree was granted. As to the facts of that case he may be said to have had his day in court, and if he had any defense to that, he had an opportunity to

make his defense. Not having made it, when he had an opportunity to do so, he is forever barred from making it thereafter, he is forever barred thereafter from setting up anything in opposition thereto. So that his counsel does not undertake in the bill of review filed, to contradict the facts upon which the decree of divorce was granted (desertion being the ground of divorce), he could not do it, because he was barred from making any such issue.

Not out of consideration for the defendant in the divorce suit, but out of consideration for the public interest, he is permitted by the law to come into court, and to show to the court, if he can, that a fraud has been practiced upon the court in regard to the right of the party to commence the suit, in regard to residence; that the court was imposed upon in being made to believe that the complainant in the divorce suit, the wife, had been a resident of the state of Illinois for one year prior to the filing of the bill for divorce. I say that is permitted to a defendant in a divorce suit upon the ground of public interest, for the public good; and in any case where the court is imposed upon as to jurisdiction, any party may come in and take advantage of it even although he benefits by so doing.

So that the only issue presented here is a question of fact as to the actual residence of the wife on the 31st day of December, 1895, the day the suit was commenced.

The complainant, the husband, has stated his story and she has told hers. They do not disagree as to one fact. It is evident from the testimony of both of them that this was a very unfortunate marriage, and it is to be deduced from the evidence I think of both the husband and the wife that the marital love between them scarcely survived the period of the honeymoon. Their story as to the main facts bearing upon the question at issue do not materially differ.

They were married in 1882. They lived unhappily—by inference from their own evidence and from the positive testimony of members of her mother's family,—until in 1888, when the husband took the wife to the East to visit his uncle. They went to Newburyport; the husband only remained a

few days,—was obliged to return to Chicago. The wife remained with his consent several weeks. When she came back, as I understand the evidence, she made some flying visits, probably to the East, I think in 1890. The evidence shows that she wished to return East to this uncle. The husband says he objected; the indifferent evidence of third parties shows that if he did object, it was on the ground of not having money to pay his wife's expenses. She went East with her aunt in 1892, and never returned to live with the defendant as man and wife from that day on.

The complainant's uncle, Captain Lunt, was an old man of some seventy-five years of age at that time, and quite wealthy, very liberal, and at that time was a hale and hearty man for his age. He was evidently pleased with Mrs. Lunt, it may be that he was somewhat infatuated with her, but that he loved her other than as a father would love a child, there is no reason to suppose for one moment, in fact the most creditable part of the complainant's testimony in this case was his declaration that he never suspected any improper conduct on the part of his wife with Captain Lunt.

In 1893 the complainant in this case, the husband, went on to Boston—I am mistaken about his wife going there in 1892, she had been there some three years at that time. In 1892 or 1893, he went to Boston, and went into business in the grain commission business,—opened up an office. His wife had induced his uncle to advance him \$10,000 in cash, at least she swears she induced him to do so, and he swears that he don't know how his uncle came to do it, as I understand it.

Now, up to the time certainly, that she left Chicago for her uncle's in the East, her residence was the city of Chicago; that was her domicile.

The first question that arises is whether she went East with the intention of changing that domicile. There is no evidence to show that she went otherwise than on a visit. Her aunt, with whom she went at that time, stated that nothing was said about her return, and that she went merely on a visit.

The relations between this husband and wife, as stated,

were not at all pleasant; they were estranged from each other, and the sexual relation had ceased for some time.

The evidence tends to show that while they lived here in Chicago some several years after their marriage, he lived with her mother and paid little or nothing for the support of himself and wife; that he never gave the wife any money of any consequence, very little, if any. I think the evidence tends to show that it was not exceeding probably forty or fifty dollars, the whole time. He says though that he gave her money from time to time as his circumstances permitted; the amount he did not pretend to state. His circumstances did not permit him apparently to pay any board, and they may not have permitted him to give his wife even pocket money. They were at that time when the wife left Chicago, husband and wife only in name, had been so for some time.

If he had never gone to Boston and had remained here in Chicago, the question arises, what would have been her domicile, her place of residence? The evidence of her stepfather, her sister and her aunt, several members of the family, shows conclusively that not only then but ever afterwards she always claimed Chicago to be her home.

Her mother died, I think in 1890 or 1892, leaving her an heir to a quarter interest in the homestead here in Chicago, which quarter interest she still retains. Now, as she went there upon a visit, what was her intention, as shown by her acts? She was in delicate health herself, her uncle became in bad health; they passed a good deal of the time on board of the yacht and in the South. She ministered to his wants. She had a home there in one sense, that is, she had her eating, her drinking, she got her clothes to wear, and it was the only place where she could sustain herself in her condition of health by her own exertions,—as she put it, she was earning her own living, because her husband did not support her.

What was she to do? Was she to come back here and make herself a charge upon her family, upon her stepfather and upon her mother while she lived? That is the question that confronted this woman when her uncle offered her a home

while he lived if she would take care of him—that was practically the arrangement. How could she do otherwise than accept? But did she in so accepting and consenting to attend to his wants while he lived, did she intend thereby to change her residence, her permanent residence from Chicago to Newburyport? If the complainant here, her husband, had never come on to Boston and gone into business in 1893, there could be in my mind no possible question. Now, did his coming on there make any change in her situation upon that question?

As I gather from the evidence, when he went on to Boston, their relations were as strained after that as they were before in Chicago; they were not husband and wife except in name. Did he take up any residence there? He says, and the evidence tends to show that he lived probably six or twelve months, maybe more, at his uncle's house in Newburyport. He paid no board, it cost him nothing, and he utters his complaint upon the witness stand here of the manner in which he was treated, that he was ignored. He says the only friend he had about the house was the pet dog. That may be true, but it tends to show the relations that existed between this man and wife, and as to whether he was in any sense providing a home for his wife. The uncle provided the home, he did not. And from the day she left Chicago, way back in 1890, the evidence fails to show that he ever said to his wife, "Come home; come to me and live with me. Here is a home ready prepared for you; I am able to take care of you."

Until his uncle's death, which was in 1896, the evidence rather tends to show that he was never able to provide her a home; he certainly never furnished one and tendered it to her. What was the wife to do at that time after he came on to Boston? He did not offer her a home, she had no other place to go except her uncle's where she was already. Could she do otherwise than as she did? Most assuredly not, in my opinion.

The case would present a different feature if when he went to Boston he had tendered her a home, had prepared a home, even had requested her to go and live with him in a home.

He was no more to her when he was in Boston, even when he was carrying on business in Boston and going home to Newburyport nights, he was no more to her, from the evidence, than any other visitor would have been to the house, and he, according to his own evidence, was neither more or less than a visitor—whether an enforced one or not is not material.

A wife may have a separate home from her husband when his conduct towards her justifies her in having one, in living separate and apart from him, but this question of domicile is a question largely of intention. A domicile once shown to exist, as it is shown to exist in this case as to the wife, and to have been in Chicago, must be shown to have been changed by clear and satisfactory evidence. If there was a doubt—and there is really none in my mind but what this was her home, her domicile in the eye of the law up to the time that she filed her bill for divorce, and for some months afterwards—if there was any doubt upon the evidence, under the peculiar circumstances of the case, they must all be resolved in favor of the wife.

This complainant was asked on the stand by the attorney of the wife, "Have you now any regard for this woman?" His answer was, "I decline to answer." The court asked him, it having been developed that he had written her a letter in which he made a claim to an interest as tenant by curtesy to some property his uncle had left her (the uncle having died in 1896, and leaving him \$75,000 and her an equal amount), he claimed an interest as tenant by curtesy under the law of Massachusetts. The court asked him here upon the stand whether he wanted a wife or wanted her property, and he said he would leave that to the court to judge. I must judge that he does not want this woman for his wife. It may be that the motive that influences him is a pecuniary one—to obtain some interest as a husband, by setting aside this decree of divorce; but the evidence tends to show also, that there is a very considerable degree of malice in this prosecution. The suit ought never to have been brought by the complainant.

The object is not to have the wife live with him. The wife has since remarried, apparently happily, married about a year after the divorce was granted, and the complainant knew this, knew of her intention to marry, but he made no objection. It is shown that at the time of his uncle's death, when his wife and himself were at the uncle's house, that the matter of her having obtained the divorce was spoken of, it had only been obtained then a few days, and that he expressed his satisfaction, and told his wife for her satisfaction that he was in love with another girl, mentioning her name, and where she lived, and that he was going down to Boston to buy her a set of diamonds and a ring, something to that effect.

He postponed commencing this suit to within a few days of the five years; a few days less than the limitation of five years limited for the bringing of the bill of review. He allowed the three years provided by a statute to lapse. He could have come in under the statute simply by making an appearance, and have had the decree re-opened, and he would be allowed to defend upon the merits; but he allowed the three years to expire, and he allowed the five years within a few days to expire.

The court has already directed the clerk to enter the judgment of this court. The finding of the court is that the equity of this cause is with the defendant, and that the complainant's suit be dismissed, with costs, for want of equity.

(Circuit Court of Cook County. In Chancery.)

Preston Kean & Co.

vs.

Enos Ayers, Collector.

(1878.)

1. **CONSTITUTIONAL LAW—CLASS LEGISLATION—VALIDITY OF REVENUE LAW ASSESSING PROPERTY OF PRIVATE BANKERS.** That provision of the revenue law which provides for the assessment of the property of private bankers as a class and prescribes a different

rule from that prescribed for listing the property of other citizens, is not so clearly and palpably repugnant to the constitution as to justify the court in declaring it invalid.

2. **TAXATION—WHETHER BANKER MUST MAKE RETURN AS TO MONIES ON DEPOSIT.** A banker is not required to make return to the taxing authorities of the moneys of his depositors. The provision of the revenue law which requires the making of a return as to "money on hand" means the money of the banker and not of the depositor.
3. **DOUBLE TAXATION—PRESUMPTION AS TO.** The revenue law will be so construed as to not impose double taxation on any species of property.
4. **TAXATION—CREDITS IN HANDS OF BANKER.** Where a banker converts the deposits of his customers into promissory notes or bills receivable, such credits are taxable in the hands of the banker even though the deposits as such were exempt.
5. **SAME—EQUITY OF.** Perfect equality or singleness of taxation in the strictest sense is an impossibility. All that can be done is to approximate as near as can be to equality of taxation.
6. **SAME—MONIES DUE TO BANKS FROM OTHER BANKS—WHETHER SUBJECT TO TAXATION.** Where part of the bonds of a banking firm are placed on deposit with other banks, such funds cannot be considered the funds of the depositors of the depositing bank but as credits of such depositing bank which are subject to taxation in its hands.
7. **SAME—GOVERNMENT BONDS HELD AS TEMPORARY INVESTMENT.** Whether government bonds which are not held as a permanent investment are exempt from taxation—*quære*.
8. **SAME—JURISDICTION OF COURT OF EQUITY TO RESTRAIN COLLECTION OF ILLEGAL TAX.** When an illegal tax is a mere personal charge against the party assessed there is no ground of equity jurisdiction as the remedy at law is adequate.
9. **SAME—IN CASE OF REAL ESTATE.** Where an illegal tax is assessed against real estate, a court of equity takes jurisdiction to remove a cloud from the title.
10. **SAME—WHEN EQUITY SHOULD NOT INTERFERE.** Inasmuch as the law gives a party an ample remedy to recover back the amount of an illegal tax and interest, equity should not interfere by injunction.
11. **TAXATION—OVERVALUATION OF PROPERTY—DECISION OF COUNTY BOARD—POWER OF COURT.** Where property was overvalued and application was made to the county board, the decision of such board which was vested with power to review assessments, was final and conclusive. Courts are not invested with power to make valuations or assessments.

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12. **TAXATION OF EXEMPT PROPERTY—POWER OF COURT OF EQUITY TO RESTRAIN—NECESSITY OF APPLYING TO STATUTORY BOARD FOR RELIEF.** When property exempt from taxation is assessed, equity has jurisdiction to afford preventive relief and the owner is not bound to apply to the statutory board for relief but may wait until an attempt is made to collect the tax and then apply to a court of equity for relief.
13. **SAME—EFFECT OF APPLICATION TO STATUTORY BOARD ON RIGHT TO APPLY TO COURT OF EQUITY.** Where a party does apply to a statutory board for relief against an assessment on exempt property, he cannot thereafter apply to a court of equity for relief.

Bill for injunction to restrain collection of tax. Heard before Judge Murray F. Tuley. The facts are stated in the opinion.

TULEY, J. :—

In the year 1878 the complainants, as private brokers, made a return to William A. Rice, collector of the town of South Chicago, of their personal property liable to taxation. The "return" not being satisfactory to the collector, he gave them due notice that he would review their assessment on the 12th day of August.

Kean, one of the complainants, appeared before the assessor upon the day fixed. There is some evidence going to show that he refused to be sworn, but there is evidence that either then or before that date, he did submit to a lengthy examination by the assessor and his attorney as to the business and property of the *firm*. The assessor added \$50,000 to the amount of taxable property returned by complainants, making a total of \$52,500, and gave them due notice thereof.

They applied to the board of county commissioners for an abatement of the amount added by the assessor, but although the committee of the board at one time appear to have been favorably inclined to recommend a reduction or abatement of a portion of the assessment, it failed to do so, but reported against any change, and the report was concurred in by the board.

Thereupon the complainants file this bill, offering to pay the tax due on \$2,500 worth of personal property, being the

amount returned by them as liable to taxation, and praying a permanent injunction against the remainder of the tax of \$2,435.99, levied upon the assessment as increased by the assessor.

I shall dispose of the constitutional point urged by complainants counsel, to-wit: that the revenue law as to the mode of arriving at the property of private bankers and the amount of tax they shall pay, is void, because it singles them out as a class, and prescribes a different rule from that prescribed for listing and taxing the property of other private citizens, with the remark, that it is not so clearly and palpably repugnant to the constitution as to justify this court and the setting aside an act of the legislature.

The sworn statement or return required to be made to the assessor by section 30 of the revenue law was made as of May 1st, 1878, by complainants as follows:

1. Money on hand or in transit.....	\$.....
2. Funds in the hands of other banks, bankers and persons
3. Checks and cash items not included in fore- going
4. Amount bills receivable and other credits due or to become due, including accounts receivable and accrued interest.....	438,971 04
5. Amount bonds and stock of every kind, shares of stock of other corporations or companies, held as an investment or representing assets	134,600 00
6. All other property appertaining to business, not including real estate.....	2,500 00
7. Amount of all deposits made with them by other parties	655,073 55
8. Amount of all accounts payable, other than current deposits
9. Amount of bonds or other securities exempt by law from taxation, specifying the amount and kind of each, the same being included in 5th item, and legal tenders...	144,750 00

By the statute the aggregate of the 7th and 8th items, to-wit: \$655,073.55 was to be deducted from 4th item, \$438,971.04. The 9th item, \$134,600 was to be deducted from 5th item, which was also \$134,600.

It will be perceived that these deductions being made there was left of all this property the paltry sum of \$2,500, which was the estimated cash value of the office furniture and fixtures.

Upon the same date, to-wit, May 1st, 1878, Preston Kean and Co. made a report to the Chicago Clearing House of the condition of their business on the close of business on that date, as follows:

The amount of deposits reported was the same as reported to the assessor.

The amount of bonds and stocks, 5th item, the same.

As to items 1, 2 and 3 in the return to the assessor, they report none on hand, but in their report to the clearing house, they report as to same matters,—

1. Cash on hand, legal tenders, \$40,000, national bank notes, \$98,181.....	\$138,181 00
2. As due from banks and bankers.....	120,151 48
3. As checks for clearings.....	44,088 81

The return to the collector and that from the clearing house were both made from the same balance sheet. It appears that to the clearing house among the resources they reported:

Bill and notes.....	\$279,917 98
Call loans on cash collaterals.....	38,901 58

and when they came to make their return to the assessor, instead of making return of the amount of money in hands of banks and bankers, they took the amount, \$120,151.48 and added it to the above items, bill and notes, and call loans, making a total of \$438,971.04, which they returned to the assessors as bills receivable, etc., under the 5th item.

Mr. Kean, when on the stand, was asked how it happened that he returned to the clearing house \$138,181 cash and \$120,151.48 "due from banks and bankers," and in his re-

turn reported to the assessor not one dollar cash on hand, nor a single dollar of funds in the hands of banks and bankers. His answer was, in substance, "that the capital of the firm, \$100,000, and the surplus was all invested in government bonds and treasury notes, and the money on hand and the money in the hands of New York and other bankers, subject to our draft, was the money of our depositors and not our own money." That the firm was advised by their attorney that they could not be made to pay taxes on moneys deposited with them, therefore they made no return of such moneys on hand or with other banks and bankers.

This is the contention of the complainants and raises the question, whether private bankers are required to return such moneys for taxation? Are deposits in the hands of private bankers taxable to the bankers?

It will be perceived that the Revenue law, sec. 30, while requiring private bankers to return "the amount of all deposits made with them by other parties" authorizes the amount of such deposits, 7th item, together with accounts payable, 8th item, to be deducted from the 4th item, i. e. bills receivable and other credits. If, however, there are no accounts payable and the only item to be deducted is deposits and the deposits are not all invested in "bills receivable and other credits," but remain partly in the money deposited by other parties, must such part of the deposits remaining in money be returned by the private banker as money on hand and be taxed to him as such?

Section 6 of the revenue law requires every person to list, among other things, for taxation, "all moneys deposited by him, subject to his order, check or draft." Section 25, in the schedule given, there appears "moneys" among articles of property to be listed. By section 27 every person is entitled to have deducted from the gross amount of credits the amount of all *bona fide* debts owing by such person.

Section 295 defines credits to be "every claim or demand for money, labor * * * due or to become due, not including money on deposit," and the same section defines "moneys" to be "gold, silver, coin, paper and other currency

* * * and every deposit which the person owning * * * is entitled to withdraw in money."

From these provisions it is clearly the intent of the law maker that the person making the deposit with the private banker shall make return, list for taxation, and pay taxes upon all such moneys so deposited.

Does the law contemplate that the banker with whom the money is deposited shall also pay a tax on the same moneys? If it does, then it is clear that the same thing, the same money, pays taxes twice in the same year. It is double taxation of that money.

As before stated, the general words of section 30 "money on hand" would seem to require the banker to make return of it for taxation. I cannot believe that such was the intention of the law makers. Double taxation is destructive of that principle of equality and uniformity of taxation so imperatively demanded by the constitution and which pervades, or should pervade, all our revenue laws.

Says Justice Cooley: "Where it is once decided that any kind or class of property is liable to be taxed under one provision of the statutes, it has been held to follow, as a legal conclusion, that the legislature could not have intended the same property should be subject to another tax, though there be general words in the law which would seem to imply that it may be taxed a second time."

Cooley Tax. 165, 166, citing *Savings Bank v. Nashua*, 46 N. H. 389; *State v. Sterling*, 20 Md. 502, and other cases.

In Massachusetts where a provision of the statute required the personal property of manufacturing corporations to be taxed in the town where the main factory was located, and by another provision the owner of every share of the stock of a manufacturing corporation was required to list such share for taxation, it was held that as the shares of stock represented the property of the corporation, the personal property could not be taxed and that taxation must be confined to the shares of the stock. The court held that a construction of the law was not to be adopted which would subject the same property to be taxed twice. In that case a literal ren-

dering of the law would have clearly required the property to be twice taxed, but the court nevertheless so construed the law, in the interest of equality, fairness and right, as to prevent the same property being taxed twice. *Salem Iron, etc., Co. v. Danvers*, 10 Mass. 514.

I am of the opinion that the requirement of the law that the banker make return of money on hand or in transit must be held to mean money of the banker (other than deposits) on hand. I do not, in making this construction of the law, ignore the decisions which hold that the relation between the banker and depositor is that of debtor and creditor; and that the money, when deposited, becomes the property of the banker and which may be attached or seized for his debts, but in this case the law is so positive in its requirement that the depositor must list and pay taxes on his moneys on deposit, the presumption of law is so strong against an intent to have the same property twice taxed; it would be so manifestly unfair and unjust that it should be twice taxed, it would be so opposed to the requirement of equality and uniformity of taxation, that I feel compelled to the conclusion that such moneys cannot be taxed in the hands of the banker so long as it retains its character of "money on deposit."

When, however, the banker converts this money into promissory notes, bills receivable or other credits, it no longer remains money on deposit, but becomes taxable to the banker. When so converted it becomes a different species of property from tangible property; it becomes intangible; instead of remaining money on deposit, it becomes "credits."

In *People v. Worthington*, 21 Ill. 171, 173, Justice Caton says: "The constitution means as it declares that each shall pay a tax in proportion to the property which he has, whether that property consists in farms or mortgages; of visible substances, or *choses in action* * * *. and it may be true in one sense to say that it is double taxation to tax the horse which is sold and also the note which is given for the purchase money; and so it is to tax the note which is given for \$100 borrowed money and also the money which is borrowed."

A man's entire fortune may consist in intangible property

or choses in action and the law contemplates its taxation as much as it does that of tangible property. Perfect equality or singleness of taxation in its strictest sense is an impossibility. All that can be done is to approximate as near as we can to equality of taxation. The entire system or theory of taxation of personal property is extremely vicious and faulty and results in the grossest inequality and injustice.

Of the thirty odd millions of money on deposit by citizens of Chicago with banks and bankers, I do not believe from all that I can learn, that there is \$50,000 of it returned for taxation, and of the entire personal property, including therein taxable choses in action, not to exceed one-tenth pays any tax of any nature or kind.

This case is not a bad illustration as to how a certain kind of personal property escapes taxation. This wealthy and well-known banking firm, handling millions of dollars yearly and undoubtedly earning a handsome annual income for its several members, a firm whose business could not be carried on for a week without police protection, is unwilling to pay as much annual taxes as is paid by every person in the community who owns a homestead exceeding twenty-five hundred dollars in value. This attempt to evade this tax—which is really not one-half what it should have been—cannot be expected to commend itself to a court of conscience, one of whose favorite maxims is that “equality is equity.”

This firm had in the hands of banks, bankers and others, subject to draft on May 1st, 1878, the sum of \$120,151.48. which it was clearly their duty to return for taxation. This money, although it may have been placed on deposit with them, had been taken from their vaults, sent to New York and other places and placed in the hands of other bankers. It became in law the money, the property of such other bankers. It could be seized for their debts and on their bankruptcy would become a part of a general fund for their creditors. It is absurd to call it the money of Preston Kean & Co.’s depositors. It is not money on deposit, subject to the order or draft of the persons who made the deposits with Preston Kean & Co.

The supreme court of this state in 1867 or 1868, in a case where this banking house was contesting a tax, decided in substance, that this bank, having kept its capital stock and surplus invested in government bonds, although they dealt in bonds and the bonds were changing from day to day, in amount and identity, was not liable to taxation on such capital and surplus. The assessor was bound to follow this decision.

If this case goes up, as it probably will, it is to be hoped that the supreme court may consider whether or not the spirit of the law which exempts capital invested in U. S. government securities from taxation, does not require that such investment should be a permanent investment, made as an investment and not a mere trading and temporary investment, as practiced by this concern.

The question raised as to the jurisdiction of a court of chancery in cases of this nature, is an important one and worthy of notice.

"When a tax is assessed as a personal charge against the party taxed, or against his personal property, it is difficult," says Judge Cooley, "to suggest any ground of equitable jurisdiction. Presumptively the remedy at law is adequate. If the tax is illegal and the party makes payment, he is entitled to recover back the amount. The illegality alone furnishes no ground of equitable interference." Cooley on Taxation, p. 538.

In the case of a tax against real estate, where the tax may ultimately ripen into a deed, a court of equity takes jurisdiction to prevent or remove a cloud from the title, the prevention and removal of clouds from title to real estate being a recognized subject of jurisdiction of a court of chancery. But where the tax is merely personal, the remedy at law to recover it back adequate, when arises the jurisdiction of equity? In fact in the later case a party is not injured until he is forced to pay the tax. When he pays the law gives him an ample remedy to recover back his money and interest, and equity should not interfere by injunction and cripple or retard the state in its effort to collect its revenue remedy by

restraining the exercise of powers perverted to a fraudulent or oppressive purpose (see *Drake v. Phillips*, 40 Ill. 388), and jurisdiction has been taken in cases where the tax was purely a personal tax, but in my opinion it is time to call a halt in this matter of judicial interference with the government in the collection of its revenues.

In this case the act of the assessor was a conscientious and just one, and there can be no pretense of any fraud and certainly none that the act of the assessor was oppressive.

Independent of the question of the jurisdiction of a court of chancery in this class of cases, and independent of the question of the legality of the tax, the complainants cannot have a decree in their favor on the case as made by the proofs.

After the assessor had raised their assessment from \$2,500 to \$52,500 the complainants applied to the county board for an abatement of the assessment. It is true, as argued by the county attorney, if the assessment that was made is to be treated as an overvaluation of the complainants' property, the decision of the county board, which was vested with power to review the assessment, would under our decisions be final and conclusive. Courts are not vested with power to make valuations or assessments. This must be done by the town assessors, subject only to review by the town board of equalization, or the county board, as the case may be.

This cannot, however, be treated merely as a case of overvaluation of property liable to assessment. The complaint is not that the assessor over-valued the office furniture, but that he included in his assessment property not liable to taxation, and that to the amount of \$50,000. This being the contention, it is argued that chancery has jurisdiction. Our supreme court has decided that chancery has jurisdiction to afford preventive relief by injunction in all cases where property exempt from taxation is attempted to be taxed. And while it is true that when property exempt from taxation is assessed, the owner is not bound to apply to the statutory board—in this case the county board—for relief, but may wait until the attempt is made to collect the tax and then go into chancery for his injunction; yet if he does seek relief

from the statutory tribunal and does not obtain it, can the owner afterwards have a standing in a court of equity and obtain the relief which was denied him by the statutory tribunal? I am clearly of the opinion that he can not.

The assessment of taxes is a legislative act. It is for that body to determine the necessity, the policy of a tax and to make necessary rules and regulations for its assessment and collection. It has full power to say what officer, board or tribunal shall review the assessment and decide all questions connected with the making of such assessments. The tribunal or board to which this power was given in this case is the county board.

By section 97 of the revenue law the county board is authorized to hear and determine the complaint of any person "that he is assessed on property claimed to be exempt from taxation." If the board decides against the complaint, then the person making the complaint has the right to appeal to the state auditor, and by the same section it is made the duty of the state auditor to present the question as to the property being exempt to the supreme court.

After the adverse decision of the county board, the complainants instead of taking their appeal to the state auditor, abandoned the pursuit of the statutory remedy and filed their bill in this court. Having abandoned their right to appeal to the state auditor and thence to the supreme court, the decision of the county board, the statutory tribunal, became final and conclusive. The question became *res adjudicata*, and beyond the power of this court or any other court to review.

The law does not give the county board exclusive jurisdiction to determine such questions, but does give it jurisdiction to do so, and the complainant having appealed to that jurisdiction was bound by its decision and could only have it reviewed in the manner and by the officer or court named in the statute. He is concluded by the decision of the tribunal to which he elected to make his complaint, and cannot after an adverse decision seek the forum of a court of equity for relief. *Weaver v. State*, 39 Ala. 535; *Commonwealth v. Cary*

Improvement Co., 98 Mass. 19; *Kimber v. Schuylkill County*, 20 Pa. St. 366.

For the reasons given, let the injunction be dissolved and the bill be dismissed at complainant's costs for the want of equity.

(Circuit Court of Cook County. In Chancery.)

Moulton, et al.

vs.

Perry, et al.

1. **EASEMENTS—CREATION BY PLAT.** An easement may be created by a plat or subdivision duly acknowledged and recorded expressly or impliedly showing its existence.
2. **SAME—EQUITABLE—SUBSEQUENT PURCHASER'S—NOTICE.** An amenity in favor of each lot bordering on a private park, to compel other owners to share in the expense of ornamenting the park is in the nature of an equitable easement and is binding on a purchaser of one of the said lots, with notice.
3. **REAL ESTATE—RIGHT OF OWNER—PLACING RESTRICTIONS ON LAND—PROVINCE OF EQUITY.** The law recognizes the right of an owner of land to impair its usefulness or to make it tributary to another piece of land and such a servitude when created is enforceable in equity.
4. **REAL ESTATE—RIGHT OF OWNER TO CREATE RESTRAINTS—LIMITATION OF RIGHT.** The only limitation to the right of an owner of realty to put restraints upon the land is that such restraints shall not be contrary to public policy.
5. **REAL ESTATE—BURDENS THEREON—EXPENSE OF MAINTAINING PARK.** The right to have land contribute to the expense of keeping up a private park, which is also for the benefit of the land contributing is not a burden on land against public policy.
6. **REAL ESTATE—CHARGE ON LAND—LIABILITY OF PURCHASER.** A purchaser of land charged with its pro rata share of the expense of maintaining a park does not assume any liability for charges incurred prior to his purchase as such a liability does not pass to subsequent purchasers.
7. **REAL ESTATE—LIABILITY IN NATURE OF A LIEN—WHEN NOT CREATED.** A liability in the nature of a lien, to attach to the land until paid for, must be created by clear and explicit language.

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8. **REAL ESTATE—IMPOSING OBLIGATION ON—NECESSITY OF NOTICE TO OWNER.** Even though a charge in the nature of a lien could be imposed by a majority of a meeting of owners called for that purpose, in the absence of notice to him, an owner who failed to attend could have no obligation placed on him or his land.
9. **REAL ESTATE—CHARGE OR OBLIGATION TO CONTRIBUTE TO MAINTENANCE OF PRIVATE PARK—HOW ENFORCED.** Any owner of land charged with the expense of contributing to the maintenance of a private park, once a valid assessment for that purpose has been made, must pay his share or he can be barred from the privilege of the park or his land might be sold through a proceeding in equity.

Bill in equity. Heard before Judge Murray F. Tuley. The facts are stated in the opinion.

TULEY, J.:—

In the year 1858 Stephen A. Douglass filed for record in Cook county a plat or subdivision of certain land owned by him which is known as the "Oakenwald Subdivision." In this plat was a piece of land, a *cul de sac* about 500 feet east and west by 250 feet north and south, fronting on Cottage Grove avenue on the west and the Illinois Central R. R. right-of-way on the east, and having 50-foot lots fronting the same on the north and south sides thereof. This piece of land was designated in the plat as "Groveland Park," and the space it occupied on the plat contained these words: "This space is dedicated as a private park by the name of 'Groveland Park,' the title being vested in the state of Illinois in trust for the use of the owners of lots fronting on the same, and to be used and enjoyed by such owners in common as a private park, and for no other purpose whatever, and to be ornamented, regulated and protected in such manner as a majority of such owners shall from time to time prescribe, such owner to share in the control and expense in proportion to the number of feet he shall own fronting or bounding on said park; and the alleys to be deemed private alleys, subject to like condition and use."

Through mesne conveyances the property has passed from

Douglass and his heirs into the parties to this suit, all the conveyances describing the lots as being in "Groveland Park" in said subdivision. The park, and roadways in the park to the lots fronting the same, have been improved by the owners of lots fronting on the park, and a considerable amount of money has been expended from time to time in such improvements.

A majority of the owners organized an association with a president, treasurer and other officers and levied or assessed against the lot owners an assessment running from fifty cents to \$1.00 a front foot each year. The assessments made in 1875, 6, 7, 8 and 9 were not all paid, the lots of the defendants hereto being the lots for which the assessments. one or more of them, remain unpaid. Some of the defendants have acquired the title after the defaults in payments had been made. It is clear from the plat itself that there is granted by the maker of the plat an easement appurtenant to each of the lots fronting this piece of land, to use the land for *egress* and *ingress* to the lots, and for the purposes for which private parks are commonly used.

The difficult question is what easements or rights are granted to each lot owner as to the ornamentation and regulation of the park, and as to the right to compel each of the lots (or the owners thereof) to share in the expense connected therewith. The bill prays that the defendants be decreed to pay to the treasurer of the association the unpaid assessments and in default thereof that their respective lots be sold therefor; that until such payments be made the defendants be restrained the use of the park (except so far as may be necessary for *ingress* and *egress* to their lots) and for general relief. Some discussion was had in the very able arguments of counsel as to whether the fee of the park is vested in the state of Illinois by virtue of the plat being acknowledged and recorded under the statute concerning "plats."

It is in my opinion immaterial where the fee of the land is vested, as the perpetual use of the property as a private park and for access to the lots is reserved as an appurtenant to the lots fronting the same. That an easement in land may be cre-

ated by a plat or subdivision duly acknowledged and recorded, expressly or impliedly showing a right-of-way, a park or other easement, can not be doubted under the authorities cited.

It is admitted that as to the sharing the expense of the ornamentation and control of the park there is no covenant, express or implied, which runs with the land. It is claimed, however, that each lot owner has an easement or a "privilege" or "amenity" in each of the other lots as to the expenses of maintaining this park. If this right which each lot owner has to demand that each of the lot owners shall contribute to the expense of the park, can be called an easement, it is of that class known as equitable easements. It could not be enforced at law, there being neither privity of contract or of estate.

Covenants, agreements and reservations in plats as to not building within a certain number of feet of a lot line; that property shall be used for residence purposes only, or prohibiting its use for carrying on noxious or offensive trades and the like, have been held binding in equity as an easement, a privilege or amenity pertaining to one lot as to adjoining or other lots in a subdivision. But these equitable easements or servitudes, it will be noticed upon an examination of the authorities cited, are all of that character which do not constrain or require the owner of the servient estate to act. His burden consists in being restrained from doing something, as, for instance, from building upon a certain part of his land, or in being obliged to suffer something to be done upon his property by another, as to suffer a passage or right of way. It is not, however, necessary to designate this right either as an "easement," "privilege" or "amenity," the only question being, is this a right which the owner of the land had the power to confer upon the owner of each lot as against the owner of every other lot abutting this park.

By reason of the dominion which every owner has over his land, the law recognizes his right to so deal with it as to restrict or restrain its use by his grantees, to impair its usefulness, or to make it tributary to another piece of his own land by imposing a servitude, and where a purchaser of land takes

it with notice that his grantor or a person through whom he claims had by agreement, express or implied, impressed upon it a certain servitude or obligation, equity will enforce the servitude or obligation because it would be unconscientious to permit such purchaser to violate or disregard the valid agreements of those through whom he claims and of which he had notice. The only restraint upon the owner in creating such easements, privileges or rights is that they shall not be against public policy or in restraint of trade. See *Whitney v. Union Ry. Co.*, 11 Gray, 359. This is subject to neither disqualification nor can the right to have land contribute to the expense of keeping up this park, which is a benefit to the land charged as well as to all the other land, be deemed a capricious reservation, limitation or burden on the property, such as we find condemned by some of the courts.

Every purchaser of one of these lots fronting this park must be held to have notice of this right on the part of the other lot owners to have the lot purchased contribute towards the expense of this park, as every purchaser claims through this plat. It is a document, a link in his chain of title, and every purchaser is bound by the recitals contained in a deed or plat which forms a part of his title. He therefore cannot complain of the want of notice, as he has certainly constructive notice. He may also be said to have apparent notice from the situation and condition of the property.

What is the nature of this liability to contribute to the expense of this park? Does a purchaser assume any liability as to past charges or claims for the expense of maintaining this park, or, in other words, does he take the lot charged with its *pro rata* of past expenses? I think not. I am inclined to the opinion that equity—by analogy to the rules prevailing at law as to the liability on covenants broken, not running or passing with the land so as to make subsequent purchasers liable therefor,—must hold that this broken obligation or duty to pay its share of the expenses of the park will not follow or pass to the subsequent purchasers of any of these lots.

It is reasonable to suppose that if the distinguished maker

of this plat, who at one time was a member of the supreme court of this state, had intended this liability to be in the nature of a lien, to attach to the land until paid, he would have expressed in clear and explicit language such intention. Such a lien must appear by clear and explicit words, it will never be held to arise by inference.

I am of the opinion that the true construction and effect of the words found on the plat is this: that each lot owner has the right, as an appurtenant to his lot, to demand of every other lot owner that he contribute *pro rata* expenses of the maintenance of this park; that there was an implied agreement by every person purchasing a lot of Douglass or his heirs, by the acceptance of a deed of a lot in this subdivision, that he would pay his *pro rata* share of such expenses, and that a court of equity will hold every subsequent purchaser (with notice) to the performance of this agreement or obligation; also that such subsequent purchaser has cast upon him by reason of being such owner, the obligation or duty to pay such portion of the expenses as may be incurred during the time he remains such owner.

But even if the words as to the expense of ornamenting, etc., of this park found on the plat could be held to create a lien or charge on the respective lots which could only be discharged by payment, this bill could not be maintained. There is no authority for a majority of the owners to form an association or *quasi* corporation with a president, secretary and other officers, and make the assessments or the acts of this organization binding. A majority in number and in frontage concurring may determine from time to time what improvement shall be made, how it shall be regulated, how protected; if necessary employ a park keeper, etc., but every lot owner must have prior notice of any meeting held for that purpose.

Notice is of the essence of things required to be done in order to impose a liability. It does not appear that all owners were notified as to any meeting which imposed the assessments, and failing in this, there was no liability or obligation fastened upon any lot owner who failed to attend.

I think these lot owners might enclose this park by fence and locked gates, leaving the necessary road so as to admit of access to the lots and make a valid regulation excluding from the privileges of the park any lot owner who failed to pay his share of the expenses imposed or voted at a meeting to which all lot owners had been notified, and they might force a contribution according to his frontage from any such lot owner by a proceeding in chancery, and upon decree obtained in default of payment sell his land. I can see no other mode of making him share the burden which his position as lot owner casts upon him.

In a case more nearly similar to this than any that I have discovered in an extensive examination of the authorities, a board of trustees was authorized by special act of parliament to control a terrace walk in which certain lot owners had privileges, and as to the expense of which they were obligated to contribute. See *Duncan v. Louch*, 14 Law J. p. 184.¹

It is possible that some similar legislation might be had as to this private park which would remove the difficulties attending its present management.

The bill must be dismissed for the want of equity.

(Circuit Court of Cook County. In Chancery.)

Lefko

vs.

Lefko

(November 4, 1904.)

1. HUSBAND AND WIFE—DESEPTION BY WIFE—WHAT CONSTITUTES.

Where the wife orders the husband out of his home this constitutes a desertion by the wife even though in the eye of the law the husband is the master of the home and has a right to continue there against the will of the wife.

¹ *Duncan v. Louch*, 6 Q. B. 904, 14 L. J. Q. B. 185, 9 Jur. 346.

2. HUSBAND AND WIFE—DESEPTION AS GROUND FOR DIVORCE. A solitary act of desertion is not ground for divorce. The desertion must be wilful and must continue for two years.
3. SAME—EVIDENCE OF DESEPTION. Where the wife prosecutes the husband for abandonment, this is strong evidence that she did not intend to desert him.
4. SEPARATE MAINTENANCE—OFFER OF HUSBAND TO RETURN. Where a wife obtains a decree for separate maintenance upon a bona fide offer of the husband to live with her, the decree becomes null and void.

Bill for separate maintenance by wife, cross-bill by husband for divorce. Gen. No. 247,287. Heard before Judge Murray F. Tuley. The facts are stated in the opinion.

Israel Cowen, solicitor for complainant.

C. M. Shabad, solicitor for defendant and cross-complainant.

TULEY, J.:—

This case has taken considerable time to try, and a great deal of the testimony in the case appears to be of very little importance. It is impossible for the court to understand why these parties separated directly after marriage, continuing to live apart, one says by agreement and the other, the wife, denies it, and that after the court had decided that he had abandoned his wife and ordered him to pay her five dollars a week for one year and after he had paid it, conformably to the order of the court, they afterward agreed to live together, and did live together for a period of eighteen months.

So far as the evidence outside of the two parties is concerned, they lived together, probably as happily as ordinary married people do, people who are struggling to get the necessities of life. Then occurred the separation between them, and upon that separation the charge of desertion is based by the husband in a bill filed in this court in January, 1904, charging wilful desertion by the wife for the period of two years.

The evidence as to many facts, many incidents in this case which rest entirely in the knowledge of the husband and wife, shows that they flatly contradicted each other and one

or the other has been guilty of a perversion of the truth; it is impossible to reconcile their testimony, the one with the other, but, admitting that the husband's side of the case as presented,—that the wife ordered him to leave the premises, was a justification for his going away and constituted an act of desertion on her part—that would be true in the case of a husband ordering his wife out of his home, and I don't see why it would not be true in a case where the wife ordered the husband out of the home—I don't recollect any decision to that effect, because, in the eye of the law the husband is the master of the home, it is his home and he has a right to continue there against the will of the wife. Having the legal right is the reason why the law looks upon the act of the wife in leaving such home as being justifiable, but even admitting that was an act of wilful desertion on the part of the wife when she broke up housekeeping and ordered the husband not to come near her, the law does not say that a solitary act of desertion shall constitute a cause of divorce. It must be a wilful desertion and must continue for two years. If merely one act of desertion constituted cause for divorce, I would have very little to do except try divorce cases, because almost every case that come before me there are probably from three to a dozen acts of desertion that occur between the parties before the final one, which culminates in desertion for two years.

Now, the act of desertion here, did it continue and does it continue up to this time? What does the evidence show? If I am correct, immediately after the breaking up of the housekeeping in January, 1901, I think the complainant said as early as March or May,—he did not appear to recollect which,—she commenced proceedings against him for desertion for abandonment, that is, desertion on his part of his wife. She commenced as early as May 3rd. That case was heard and dismissed. She persisted, and I think on May 23rd, 1901, commenced a new suit against him for abandonment that met with the same fate. Then the next month, June, 1901, the third, a suit for abandonment that took place after the act of desertion complained of by the husband in January, 1901,

had taken place, and that also had the same order of dismissal, but finally, in a suit commenced in July, 1901, she obtained a judgment, and there is where the question arises—the court must assume that there was authority in the officer to act, that the laws of the state of New York justified action of that kind. We have a law of that kind. A proceeding was had, he appeared, he was found guilty of abandonment, and ordered to pay her \$2.50 a week, which he paid up to November, 1902, practically the whole year, or very nearly the whole year.

Now, here was a weekly acquiescence in the condemnation of the court that he was guilty of abandoning his wife, and that he was under obligation to support her, and he did support her for a year. That brings us to November, 1902. From November, 1902, to January, 1904, is less than two years, so that the statute as to desertion would have commenced at that period. I do not see how an action for desertion under such circumstances can be maintained by the husband.

The evidence tends to show that notwithstanding the wife participated in this order, that he left the city of New York without her knowledge and came to Chicago; that she had to employ the police to hunt him up and when she found him he was here in Chicago, and she pursues him again, this wife that had deserted him, pursues him again for abandonment of her, his legal wife, here in Chicago.

If that does not show that so far as the wife was concerned she never had any thought of abandoning him or deserting her husband, I do not know how evidence could be made stronger. I don't see how there could be stronger evidence that she did not intend to desert him by the occurrences that took place in January, 1901.

She files her cross-bill, in which she claims she is living separate and apart from him without her fault. She also sets up that at the time they did live together that he deserted her in January, 1901, and that while they did live together, that he was cruel to her and specifies three different acts of cruelty. Everything connected with that is specific-

ally denied by the husband, and the evidence in support of it does not properly justify the court in saying that it is sufficiently proven to justify her in living separate and apart from him.

But she has no desire to live separate and apart from him. She brings her bill for separate maintenance, but if she gets her decree for separate maintenance, upon a *bona fide* offer of the husband to live with her, that decree would be null and void.

I find that she has been living separate and apart from him since January 19, 1901, at least since the commencement of the first suit which showed a desire to live with him as his wife, cohabiting with him, because she sued him for abandonment as early as May, 1902. From that time, I think the evidence shows that he refused to live with her and that she is living separate and apart from him.

Now, is it without her fault? Has she given him justification? I cannot see that she has, I cannot see the evidence of it. Is it a justification for the husband or is it the fault of the wife that she commences a suit for abandonment against her husband, follows him from month to month? Does it not show that she is only insisting upon her legal right to have him support her? The evidence tends to show that this woman kept her house nicely, she took care of her husband and I cannot see any reason unless there is hidden reason why this man could not live with this woman, unless there is some reason that is not apparent to the court. It looks a little bit to the court, as claimed by the wife, that he used all her money, did not support her and then failed to properly provide for her; even if he could not obtain the money she had a right to legal support. I cannot see that it is her fault that he is living separate and apart from her, and being without her fault, the decree will go for separate maintenance, \$2.50 a week.

I will allow you \$20 solicitor's fees, to be paid in sixty days and \$10 taxed for depositions.

(Criminal Court of Cook County.)

City of Evanston

vs.

Ben W. Lord

(March, 1893.)

1. **MUNICIPAL CORPORATION ORDINANCES EXCLUDING BICYCLES FROM SIDEWALKS, VALIDITY OF.** An ordinance prohibiting bicycle riders from using the sidewalk of a street, or any street within the city limits is within the power of the city council to enact, and is reasonable.
2. **CITIES AND VILLAGES—POWER TO ENACT ORDINANCE.** It is within the powers given cities and villages by the ninth, fourteenth, sixty-sixth and ninety-second clauses of the powers given by the cities and villages act, for a city to enact an ordinance prohibiting the use of bicycles on its sidewalks.
3. **ORDINANCE PROHIBITING VEHICLES ON SIDEWALK INCLUDES BICYCLES.** An ordinance prohibiting vehicles on sidewalks includes bicycles as the term "bicycle" is covered by the generic term "vehicle."

In the criminal court of Cook county. Action of debt to recover a penalty for a violation of a city ordinance. Heard before Judge Edward F. Dunne, March, 1893.

The facts are stated in the opinion.

DUNNE, J.:—

This is an action in debt, brought by the city of Evanston against the defendant, to recover from him a penalty of not less than one nor more than ten dollars, for the violation of section 487 of the revised ordinances of the village of Evanston, as amended by an ordinance of the village of Evanston, passed October 4th, 1887. Section 487 of said ordinance provides as follows: "No person or persons shall push or back any horse, wagon, cart or other vehicle over any sidewalk, or use, lead, ride, or drive any horse, wagon, sled or sleigh thereon, unless it be in crossing the same to go into a yard or lot where no other suitable crossing or means of access is provided, under the penalty of not less than one dollar nor more than ten dollars for each offense."

The evidence shows that in violation of said section, the defendant was, on the 11th day of June, 1892, riding a bicycle upon a public sidewalk on Chicago avenue in the city of Evanston, and was not crossing said sidewalk to go into a yard or lot. The defense set up is first, that said ordinance was not properly proved; and secondly, that if proved, it is unreasonable and beyond the power of the village to pass, and therefore void.

The first objection is technical, and was not called to the attention of the court when the ordinances were offered in evidence.

The ordinance provides "That no person or persons shall push or back any horse, wagon, cart or other vehicle over any sidewalk." I cannot find any definition of the word "bicycle" in Webster, probably because of its recent origin; but a "vehicle" is defined therein as "That in which anything is or may be carried, as a coach, wagon, cart, carriage, or the like—a conveyance. That which is used as the instrument of conveyance or communication." Webster's International dictionary defines a velocipede to be "a light carriage propelled by the feet;" and a vehicle as "that in or on which any person or thing is or may be carried." The Century dictionary defines "velocipede" as "a light vehicle or carriage with two wheels or three, propelled by the rider;" a bicycle as a "modification of the velocipede" and a vehicle as "any carriage moving on land—an instrument of conveyance."

From these definitions it appears that a bicycle is a modification of a velocipede and that a velocipede is a vehicle. The generic word vehicle in the ordinance it follows, covers and includes velocipedes and bicycles without specifically mentioning the same.

It has been held judicially in the case of *Taylor v. Goodwin*, L. R. 4 Q. B. Div. 228, that the generic word "carriage" includes a bicycle. In that case defendant, riding a bicycle, was convicted under the statute prohibiting the "furious driving of a carriage."

The force of this decision is in no way weakened, as claimed by counsel for defendant, by the case of *Williams v. Ellis*, L. R. 5 Q. B. Div. 175. In this latter case it was contended

that a bicycle was liable to pay toll upon a turnpike under a statute fixing tolls "for every * * * coach, sociable chariot, Berlin, Landau, * * * hearse, litter, or other such carriage." The use of the language, other such carriage, plainly shows the intent of the act to restrict the collecting of toll from carriages of the description and character of those enumerated; and the court comments in the decision, on the different phraseology of the two statutes; and in no way disaffirms the position taken in the earlier case. In *Taylor v. Goodwin*, the generic word "carriage" without restriction or limitation is used as in the ordinance; in the case at bar the word "vehicle" is used; and the decision there rendered is of weight in the determination of the case under consideration.

In a short treatise in 24 Alb. L. J. 282, it is laid down that "In the absence of any legislative enactment forbidding them, riders of bicycles would seem to have the same right upon highways as those using any other vehicles. This of course would exclude bicycles from sidewalks which is quite necessary," quoting from Cook on Highways.

Conceding, therefore, that the generic word "vehicle" in the ordinance covers and includes the word "bicycle" the only questions left for determination are: *First*. Is the ordinance unreasonable? *Second*. Had the village of Evanston the right to pass the same?

First. As to the question as to the ordinance being reasonable or unreasonable?

The streets of all cities of any size in modern times are laid out by the municipal authorities with provisions and facilities for both foot passengers and vehicles. The center of the street, except in the case of some boulevards, has been invariably reserved for the use of horses and vehicles, and the sides of the street have been set apart for the use of pedestrians. This disposition of the streets has been found not only convenient, but absolutely necessary, and the sides of the streets have been invariably designated as they are in the ordinance in question, as sidewalks; showing plainly that they were intended for the exclusive use and benefit of pedestrians. No

reasonable man can question the convenience and necessity of this arrangement.

Such being the fact can it be said to be an unreasonable ordinance which prohibits the use of the sidewalks by wheeled contrivances whose rapidity in these modern times is equal to that of the swiftest horses?

If an ordinance excluding bicycle and bicycle riders from the portion of the streets intended for the use of pedestrians, is void, because of its unreasonable character, the word sidewalk should be abolished, and the life and limb of pedestrians in any large city would ever be in peril. The city of Evanston has a population of fifteen thousand people and Chicago avenue, upon which the defendant was riding at the time of his arrest, is one of its main thoroughfares. It is certainly within the province of the city council, in the exercise of reasonable discretion, to prohibit bicycle riders from using the sidewalk of this street, or any other street within its limits.

Being of the opinion, therefore, that the ordinance is reasonable, let us examine whether or not it was within the power of the board of the village trustees to pass the same. Among the powers given to cities and villages by the act of the Illinois legislature, chapter on cities and villages, revised statutes of Illinois, are the following: 1. Ninth clause, power to "regulate the use of the streets and sidewalks." 2. Fourteenth clause, power "to regulate the use of sidewalks." 3. Sixty-sixth clause, power "to pass and enforce all the necessary police ordinances." 4. Ninety-second clause, power "to prevent and regulate the rolling of hoops, playing of ball, flying of kites, or any other amusement or practice having a tendency to annoy persons passing in the streets or on the sidewalks."

It cannot be successfully contended that power was not given to the village of Evanston, under one if not more of these provisions, to pass the ordinance in question. In the opinion of this court ample authority is given by two, if not more, of these powers. The ordinance in question, passed in pursuance of these powers is not *ultra vires*, but on the contrary is within the powers conferred by the statute, and is valid and binding.

(Circuit Court of McLean County.)

Hayden, Use, etc.

vs.

Chicago & Alton Railroad Co

(February 10, 1880.)

GARNISHMENT—WAGES EXEMPT FROM—RETROACTIVE EFFECT OF EXEMPTION ACT. The act in force July 1, 1879, giving fifty dollars exemption to head of family, applies to cases of debts contracted before the act went into force, if the wages were earned after the act took effect.

Garnishee summons on judgment. Heard upon trial before Judge Reeves in the circuit court of McLean county, February term, 1880.

The facts are stated in the opinion of the court.

REEVES, Circuit Judge:—

In May, 1879, Hayden became indebted to Hibernian Benevolent Society. In August following the Hibernian Benevolent Society recovered a judgment against Hayden. In November, 1879, Hayden commenced working for C. & A. R. Co. In December, 1879, the garnishee summons in this case was sued out on the judgment and served on the R. R. Co. It answered that it owed Hayden for wages, as a laborer, the sum of \$31 and that Hayden was the head of a family, residing with the same, and claimed the same as exempt. It is contended that Hayden is only entitled to \$25 as exempt.

By the amendment to the garnishment act in force July 1, 1879, the wages and services of a laborer, being the head of a family and residing with the same, to an amount not exceeding \$50, shall be exempt from garnishment. Previous to this amendment the exemption was only \$25 and it is insisted that the exemption in force at the time the debt was contracted must govern and control.

The wages garnisheed in this case were earned in November, 1879. It was admitted on the trial of this case, that Hayden, at the time the debt, upon which the judgment was rendered,

was contracted, had no property whatever. The proposition that an exemption in force at the time of the contraction of the debt forms part of the contract and can not be increased as to such contract applies, as it seems to me, only to property and not to such an exemption as is under consideration in this case. The suggestion also occurs to me that this proposition can only be held to apply to property that the debtor had at the time of the making of the contract, or to property which he afterwards acquired from means or funds which he had at the time of the making of the contract, and would not apply in a case where, at the time the contract was made, the debtor had no property of any kind in possession or expectancy but subsequently should acquire property by his labor and skill.

(Circuit Court of Cook County. In Chancery.)

People ex rel. Charles H. Reed, State's Attorney,

vs.

John G. Grindele, County Clerk, et al.

(April 26, 1870.)

1. **EQUITY—JURISDICTION—PREVENTION OF DAMAGE TO PUBLIC—PROPER PARTY COMPLAINANT.** Equity has jurisdiction to prevent by injunction, at the suit of the state's attorney on behalf of the people the delivery by the clerk of the circuit court, of books upon which assessment for the current year is to be made, to rival sets of claimants to the assessor's offices of Chicago, because of the irreparable damage to the public which would necessarily result therefrom.
2. **STATUTES—CONSTITUTIONALITY—EMBRACING TWO SUBJECTS.** A statute does not embrace two subjects simply because one section relates to the manner of levying assessments and the other to the term of office of assessors.
3. **SAME — CONSTITUTIONALITY — CHANGING TENURE OF OFFICE.** Where there is no constitutional provision in regard to the tenure in office of an officer, the legislature can extend or shorten such tenure as it may see fit.

Bill for injunction. Heard before Judge Williams. The facts are stated in the opinion.

Messrs. Atwood and S. A. Irvin, for complainant.

Gen. R. W. Smith, for respondents.

WILLIAMS, J.:—

Three bills have been filed in this court by the above-named complainant, acting on behalf of the people of the state against the county clerk, to restrain him from delivering to certain persons, claiming to be assessors of the towns of North, South and West Chicago, the books upon which the assessment of the respective towns are to be made for the current year.

The facts alleged in the bills are substantially the same, so far as they become necessary to the understanding of the questions passed upon in this case. They are as follows: That in November, 1868, certain persons were elected assessors of the towns of North, West and South Chicago, who were duly qualified and entered upon their duties as assessors of each of those towns; that in March, 1869, the legislature of this state passed an act extending the term of said assessors to November, 1870, and making the elections of assessors biennial thereafter, instead of annual, as they had theretofore been; but that, notwithstanding such act of the legislature, an election was in fact had in November, 1869, and Josiah A. Bross, J. B. Murray, and Charles Haussner, were elected assessors, and that the clerk of the county court is now preparing and is about to deliver to each of the parties last-named, as well as to the assessors elected in 1868, books upon which they may severally make the assessments for the current year.

To each of these bills a demurrer has been interposed, and the questions raised and argued are, first, whether these suits can properly be brought by the state's attorney in the name of the people; and, second, whether the law passed in 1869 is constitutional.

If the people of the state are likely to receive, in consequence of the proposed action of the county clerk, great and irremediable injury; and if, by the action of this court alone,

such injury can be prevented, then a court of chancery should interpose for their protection. This is not a question of fees between two rival sets of assessors, but it is a matter in which the interests of the public are vitally involved. The state must be permitted to collect its taxes, and the counties and towns to collect theirs, else the whole machinery of government is impeded in its motion, and at last stops for want of the propelling power. That the issuance of two sets of books to two sets of assessors would interfere with the collection of taxes no one can doubt. The tax-payer could not decide which assessment was valid. Both sets of assessors have the muniments of title to their several offices. Both claim to represent the state in its attempts to collect its revenues. And yet one of the parties so professing to act is not an assessor, recognized by the law, and the other is. The action of the county clerk in thus investing two persons with the muniments of office when only one is entitled to exercise its duties, would not only, therefore, involve a great expense in the preparation of a double set of books, but it would give persons an excuse for the non-payment of taxes after they were assessed, and lead to infinite litigation. Under such circumstances there could not fail to be immense loss to the state.

A court of chancery is the only tribunal which can, by its strong arm, effectually and entirely prevent such loss, and the state, represented by its law officer, is the only proper person to invoke the aid of this court, at the present stage of the controversy. At some subsequent period, when their rights were about to be prejudiced, tax-payers might apply to this court or the superior court for protection, but now there can be no adequate remedy, except it can be obtained by the people in the manner they have sought to obtain it by their present bills. *Kerr et al. v. Trego et al.*, 47 Pa. St. 292; *Doolittle v. Supervisors, etc.*, 18 N. Y. 155; *Scely v. Bishop*, 19 Conn. 128; *Board of Supervisors, etc., v. Keady*, 34 Ill. 293.

I can hardly conceive of a case where the interposition of a court of chancery is more immediately demanded than in

the cases now under consideration. That necessity is even greater in a case where the clerk proposes to issue two sets of books to two sets of officers, one of which cannot be authorized by law to act, than if he was about to issue only one set of books, and that to the wrong persons. The uncertainty of the tax-payer would be greater in the former than the latter case. This, then, is clearly a case where a court of equity has not only the right to interfere, but where it becomes its absolute duty to interfere, and decide who are the legal assessors for the respective towns of North, South and West Chicago.

In March, 1869, the legislature passed the following act:

"An act in relation to assessments and assessors in certain towns in Cook county.

"Be it enacted by the people of the state of Illinois in the general assembly:

"Section 1. That when the assessors of the towns of North, West and South Chicago, in Cook county, shall in each year have completed the assessment of the property in said towns, they shall respectively give notice, by three days' publication in one of the daily papers of the city of Chicago, that the same is completed, and will be open, at some public place, to be named in said notice, for inspection, correction and revision, for ten days from the first publication of said notice. The present assessors of said towns shall remain in office until November, A. D. 1870, and shall thereafter be elected biennially.

"Sec. 2. This act shall be a public act, and shall be in force from and after its passage."

By that act they not only changed the manner in which the assessors for the respective towns of North, South and West Chicago should give the notices required by law, but they continued the three assessors in office for one year beyond the time for which they were originally elected, and made the elections thereafter biennial instead of being annual as they had been theretofore. It is claimed that this act is unconstitutional for two reasons. First, because it embraces two sub-

jects. Second, because it is virtually an appointment or election by the legislature of an officer within the meaning of the constitution of this state.

But the act does not embrace two subjects in its provisions. It relates only to assessors and assessments, and if this act is void for the reason indicated, so is every act upon the statute book which contains more than one section. *O'Leary v. Cook County*, 28 Ill. 534.

It was admitted by the counsel for the defendants, upon the arguments of these demurrers, that the legislature might extend the time of an election, and could continue the then incumbents in office until the date of the next general election, but not thereafter.

There is no constitutional provision affecting the tenure of office of assessors, nor even any such office recognized by the constitution. The legislature could, therefore, abolish the office altogether, and cast the duties upon some other officer, or they could extend or shorten the tenure of office. It has been decided, in very many cases, that, in the absence of any constitutional limitation or restriction, such was the power of the legislature. *Taft v. Adams*, 3 Gray, 130; *Connor v. City N. Y.*, 2 Sandf. 355; *Dartmouth College Case*, 4 Wheat. 518, 627; *Butler et al. v. Penn.*, 10 How. 402, 416.

And I know of no case which holds that a legislature, in case they should deem fit to extend the tenure of an office, should be limited by the occurrence of a general election.

The legislature could have made the tenure of office originally ten years instead of one for the assessors in this state, and they have the same power to extend the tenure of an existing office. The propriety of exercising such a power in any case may well be doubted, especially in a state where the policy of popular elections is so deeply engrafted upon our whole system of government, but the power and the right of a legislature so to act has been settled too often by the adjudication of courts to be now denied.

It is not the first time that such legislation has been had in this state in extending for the then incumbents the terms of their offices, and, though the propriety of such action will

always be questioned and generally will be doubted or denied, the unconstitutionality of it has never, so far as I know, been announced by any legal tribunal. I hold, therefore, that under the law of March, 1869, the assessors elected in 1868 are assessors *de jure* as well as *de facto*, and to them only can the county clerk rightfully deliver the assessors' books. The demurrers to each of the bills will therefore be overruled.

(Circuit Court of Cook County. In Chancery.)

Thomas, et al.

vs.

Chicago Trust & Savings Bank, D. H. Tolman, et al.

1. CORPORATIONS—WHERE SAME PERSON IS PRESIDENT OF TWO CORPORATIONS—NOTICE AS PRESIDENT OF ONE CHARGEABLE TO OTHER CORPORATION. Where a person is president of two corporations having dealings with each other, both corporations are chargeable with whatever knowledge such individual receives as president of either corporation.
2. COLLATERAL SECURITIES—SALE OF—WHEN SET ASIDE. Where a pretended sale is made of collateral securities for the purpose of avoiding the defense of usury, the purchaser of such collateral with notice of the facts stands in the same situation as his vendor and cannot be regarded as a purchaser for value.
3. COLLATERAL SECURITIES—SALE OF SET ASIDE—CONDITIONS. Where a sale of collateral securities is set aside because not *bona fide* the complainant will be required to pay all the loans secured by the collateral with legal interest.
4. CORPORATIONS—POWER TO GUARANTEE—COMMERCIAL PAPERS. A corporation is not empowered to guarantee commercial paper of another corporation.
5. CORPORATIONS—REFUND OF CONSIDERATION PAID FOR UNAUTHORIZED GUARANTY. Where a corporation guarantees the commercial paper of another corporation and such guaranty is *ultra vires*, it will be required to account for the consideration received for such guaranty.
6. COMMERCIAL PAPER—RIGHTS OF TRANSFEREE WHERE LOANS USURIOUS. Where notes are transferred with notice of the fact that the loans evidenced by the notes are usurious, such transferee takes the notes subject to the equities attaching to such notes in the hands of the former holder

Bill for accounting. Heard before Judge Murray F. Tuley. The facts are stated in the opinion.

TULEY, J.:—

This is a bill filed by complainants, seeking an accounting as to a large number of usurious transactions between complainants and the defendants, running through a period of five or six years prior to the filing of the bill, and also seeking to set aside an alleged sale of notes, mortgages, etc., amounting to some \$30,000 in value, held as collateral security for the usurious loans. It is admitted that usury tainted all the numerous loans, and that the rate of two and one-half per cent. per month was the interest charged up to the year 1888, when the complainants were induced to purchase five shares of stock in the Midland Company, since which time one per cent. a month was paid the Midland Company for its guarantee, and one and one-half per cent. a month to Tolman or to the Trust & Savings Bank upon all loans as interest.

The Midland Company was organized by D. H. Tolman with a capital of \$100,000 for the purpose, first, of enabling Tolman to sell its stock for a profit of fifty thousand dollars; second, to force the customers of the Trust & Savings Bank to buy the stock of the Midland Company in order to obtain accommodations at the Trust & Savings Bank; third, to guarantee the notes of its stockholders and make such stockholders carry each other, and, fourth, under the name of guarantee to cover up a portion of the usurious interest charged by the Trust & Savings Bank. Some of the witnesses allege that Tolman declared it to be a wheel within a wheel "to enable the bank to beat the usury defense." Whatever was the object of Tolman, who was the chief owner of the stock of the Trust & Savings Bank and president of both corporations, I do not see how the court can escape treating them as distinct corporations.

I cannot go into a detailed statement of the many transactions between these parties. It is the old, old story of the usurer and his victim. I can only briefly announce my findings and conclusions.

First. That on the same day and before the filing of this

bill, the complainants caused to be made to D. H. Tolman (who was authorized to receive the same), a tender of the sum of \$6,375), which was more than was due from the complainants upon all their indebtedness referred to in the bill.

Second. That on all the loans made and subsequent dealings in connection therewith, the complainants dealt with Tolman as president of the Chicago Trust & Savings Bank, and the bank is estopped to deny that fact so far as complainants' rights and interests as to the said usury and said securities pledged therefor are concerned.

Third. That as Tolman was president of both the Trust & Savings Bank and the Midland Company, whatever knowledge he had as president of the one, he had as president of the other, and both institutions are chargeable with whatever knowledge or notice he had as president of either; also that Tolman himself as an individual is also charged with such knowledge or notice.

Fourth. That the defendant Charles was a mere tool or instrument of Tolman, one of the many "hands" with which Tolman carried on his many usurious operations, and that the pretended sale to Charles of the collaterals within a few minutes after the tender was made was not a sale in good faith upon either side; that it was only a colorable sale and should not in equity be allowed to prejudice complainants' rights in such collaterals.

Fifth. That Charles took the collaterals with knowledge that Tolman's object in making the transfers was to avoid, if possible, the defense of usury, and that Charles took such collaterals with the intent to aid and assist Tolman and the two banks to defeat the complainants in the suit about to be brought to compel an accounting and the surrender of said collaterals.

Sixth. That Charles is not a purchaser for value in good faith and without notice of such collaterals and stands in no better position than his vendors as to such collaterals; that whatever title he took, if any, in such collaterals, he took subject to the equities between the complainants' and his, Charles', assignors.

Seventh. That in equity and good conscience the said col-

laterals and each of them, and the proceeds thereof, in the hands of Charles or of the receiver of this court, should be restored to the complainants upon the payment by complainants of all the moneys received upon the loans, discounts (or renewals thereof), for which the said collaterals were respectively pledged, with interest at 6 per cent. per annum on each loan discount or renewal thereof, including in "moneys received" such sums as were paid for expenses or otherwise for complainants' benefit. The moneys paid to Midland & Co. for guarantees should not be treated as paid for interest, or credited as against such loan discounts or renewals thereof, except as hereinafter stated in the accounting with the Midland Company.

Eighth. That the Midland Company was not authorized by its charter to guarantee the complainants' paper and should account to complainants for all moneys paid it for such guarantees. That the Midland Company took the notes that it now holds and which are in judgment, as stated in the bill, with full notice of the usury paid in regard to the loans, discounts (and renewals thereof) for which the same were given and holds its said judgments and notes subject to all the equities attaching to said notes in the hands of the former holder of said notes. That an account should be taken of the amount due upon said notes respectively, excluding all usury and allowing interest at 6 per cent. per annum upon each loan, discount (or renewal thereof), and said Midland Company should be charged with all sums paid to it for its guarantee on any such loan, discount (or renewal thereof) and in addition, should be charged with all moneys paid it for its guarantee upon any other loan, discount (or renewal thereof) made by said complainants of the other defendants, said Trust & Savings Bank, or said Tolman. That there should be a reference to a master in accordance with the findings now made, and this decree shall be treated as interlocutory and all other matters be reserved for further decree herein upon the coming in of said master's report.

(Municipal Court of Chicago.)

Smith, et al.

vs.

Loyal Americans of the Republic.

(1907:)

1. **CORPORATIONS—CONSOLIDATION—NATURE OF.** Consolidation is to be distinguished in law from a succession or a purchase or a transfer of assets. The usual form of consolidation is for one corporation to issue its own stock to the shareholders of the other.
2. **FRATERNAL INSURANCE COMPANIES—CONSOLIDATION—WHAT CONSTITUTES.** Where the members of a fraternal organization are transferred to another similar organization and the latter issues new certificates of insurance to the former members of the other company, this is in effect a consolidation.
3. **CONSOLIDATION OF CORPORATIONS.** Corporations cannot be consolidated without express legislative sanction.
4. **FRATERNAL BENEFIT SOCIETIES—RIGHT TO CONSOLIDATE.** Under the laws of Illinois, fraternal benefit societies are not authorized to consolidate.
5. **SAME—RIGHT TO PAY FOR OBTAINING NEW MEMBERS.** Under section 8 of the Fraternal Benefit Association Act which provides that such societies shall not employ paid agents in soliciting or procuring members except in the organizing or building up of subordinate bodies, or granting members inducements to procure new members, it is contemplated that all such new members shall be secured by individual application and medical examination. It does not include the wholesale transfer of all the memberships in another organization.
6. **SAME—CONTRACT WITH MEMBERS—WHAT CONSTITUTES.** The contract between a member and his society consists in his application, examination by physician, constitution, by-laws, and certificate.
7. **CORPORATIONS—ULTRA VIRES—ESTOPPEL.** The doctrine that a corporation cannot avail itself of the defense of *ultra vires* when a contract has in good faith been performed by the other party and the corporation has had the full benefit of its performance does not apply where such contract is immoral or illegal or prohibited by statute, or where its enforcement would be against public policy.

On demurrer to amended fifth and sixth additional counts. No. 350. First class. Heard before Judge Foster. The facts are stated in the opinion.

Messrs. *Dandridge & Pugh*, attorneys for plaintiff.

D. W. Dixon, and *Tenney, Coffeen, Harding & Wilkerson*, attorneys for defendant.

FOSTER, J.:—

The two additional counts demurred to set out in substance that the defendant is a Fraternal Benefit Society, which was originally organized under the Act approved and in force June 22, 1893, under the name of Royal Circle, and that the defendant now acting under its new name is governed by that act and the acts amendatory thereto; that the Fraternal Army of Loyal Americans was another society of the same kind as defendant with "a rate paying membership of more than 22,500 members," and that the defendant employed the plaintiffs, who were members of defendant society, to procure and bring about * * * a so called consolidation and uniting of the membership of the Fraternal Army of Loyal Americans with the defendant, which said consolidation and uniting consisted and was to consist in the securing and transferring to the defendant of the said membership and the re-insurance of the said members of the Fraternal Army of Loyal Americans in the defendant society, and that plaintiffs did procure said so called consolidation or uniting * * * and did secure and cause to be transferred to the defendant about 22,500 members, more or less, and the insurance of said members by the defendant; that the acts of plaintiff resulted in the organizing and building up of a great number of subordinate lodges of and for the defendant, and secured new members "to the number of 22,500 as aforesaid."

The counts contain further allegations as to the benefits that accrued to defendant from plaintiff's acts, and one proceeds on the theory of *quantum meruit*, while the other alleges a special contract to pay plaintiffs the amount of \$70,000 in consideration of these services.

While there is perhaps some ambiguity in the language em-

ployed, it sufficiently appears, and is, we understand, admitted by counsel that the substance of the transaction was a consolidation or uniting of the membership of the two fraternal benefit societies; as counsel for plaintiff states, "The acts themselves being set out, it seems immaterial whether they are referred to as a 'consolidation,' 'amalgamation,' 'merger,' or 'benevolent assimilation.'"

"Consolidation" is to be distinguished in law from a succession or a purchase or transfer of assets; *Loughlin v. U. S. School Furniture Co.*, 118 Ill. App. 36; but here, where all the 22,500 members were transferred and reinsured by the defendant, it would seem that the word "consolidation" was correctly used by the plaintiffs in their declaration. As is said in 10 Cyc. p. 314, "The * * * usual form (of consolidation) is for the purchasing company to issue its own shares to the shareholders of the selling company in payment or exchange therefor." To the same effect is the decision of our supreme court in *C. S. F. Ry. Co. v. Ashline*, 160 Ill. 373. This case emphasizes such issuance of stock as the distinguishing feature of a consolidation. Applying this principle to insurance companies, it is hard to see how "consolidation" could be more completely effected than in the case at bar, where the defendant company, it would appear (although the allegation is not specific), issued new certificates of insurance to the former members of the other company.

The main question, therefore, that arises on this demurrer is whether or not the defendant corporation and the Fraternal Army of Loyal Americans could be lawfully consolidated or merged.

As stated by our supreme court in *American Trust Co. v. Minn. & N. W. R. R. Co.*, 157 Ill. 641, "Corporations cannot be consolidated without express sanction of the state * * * and if the power to consolidate with other railroads is withheld, it is regarded as a prohibition against the exercise of such a power; 3 Wood on Law of Railroads, sec. 486." This case is followed, and its doctrine applied to an attempted merger of a domestic with a foreign insurance company in *Kavanaugh v. Omaha Life Association*, 84 Fed. 295.

There is no general statute of the state of Illinois authorizing the consolidation of such corporations, and the question presented must be determined by an examination of the particular act under which these two companies were organized.

In *Lehman v. Clark*, 174 Ill. 279, Mr. Justice Phillips said: "It was held in *Bastian v. Modern Woodmen*, 166 Ill. 595, that the two acts approved June 22, 1893, were designed to create certain classes of corporations furnishing life insurance or indemnity under various former acts and to enact and create a complete code for each." In fact, the act in force July 1 contains an express provision in section 11 that it does not apply to fraternal benefit societies and the act in force June 22, 1893, expressly provides in section 1 that "all such (benefit) societies shall be governed by this act, and shall be exempt from the provisions of all insurance laws of this state, and no law hereafter passed shall apply to them unless they be expressly designated therein." (Hurd's revised statutes, chap. 73, sec. 258.) What construction, then, is to be put upon the fraternal benefit society act approved and in force June 22, 1893? Hurd's revised statutes, chap. 73, sec. 258, *et seq.*, p. 1222.

It is to be noted that the assessment company act approved on the same day, June 22, 1893, but in force July 1 (Hurd's revised statutes, chap. 73, sec. 230 *et seq.*, p. 1214, contains an express clause (sec. 16, Hurd's revised statutes, sec. 245, p. 1219) authorizing the transfer of all of the risks of a company organized under its provisions, but prescribes certain conditions that must first be complied with for the protection of the insured, to wit: That the contract of transfer or re-insurance must be approved by a vote of two-thirds of the insured at a meeting specially called for the purpose, and each member is given the right within ten days after the meeting to give notice that he prefers to be transferred to some other society.

These provisions, have of course, no application to the case at bar, but they indicate the policy of the state to protect the insurance certificate holders. See also *Boles v. Mutual Re-*

serve Life Association, 220 Ill. 400, and *Brown v. Mutual Reserve Life Association*, 224 Ill. 576. Indeed, all life insurance companies are peculiarly under the control of the state for the protection of their members. *Chicago Life Insurance Company v. Auditor*, 101 Ill. 82.

The very fact that the assessment company act passed by the legislature at the same session and approved on the same day contained the above power to consolidate, while the act herein in question contained no such power, is in itself evidence that the legislature did not wish to authorize, under any circumstances, a consolidation of fraternal benefit societies.

It is not altogether clear just how the "consolidation," "merger," "amalgamation," or "benevolent assimilation"—to use again the terms applied by plaintiffs—was brought about, but enough does, we think, appear from the declaration to show that the Fraternal Army of Loyal Americans went out of existence, for not only were its full 22,500 members transferred to the defendant, but, as appears by the sixth additional count, "all the assets of the Fraternal Army of Loyal Americans, amounting to approximately \$40,000 in cash and securities," were received, used, and retained by the defendant. Enough, we think, is stated to show that the transfer of members to the defendant was in bulk, and not in the regular method of receiving separate applications and passing medical examinations. In fact, the declaration refers to the "ordinary and usual methods of securing premium paying members * * * by solicitation of individuals" as being quite different from the methods pursued here by which the plaintiffs "caused to be transferred to the defendant about 22,500 members." The plaintiffs cite in their brief three different cases, whereas their brief states the "reinsurance contract was similar to the one in controversy." In two of these cases—*Seymour v. Chicago Guaranty Fund Life Association*, 55 N. W. 907 (Minn.), and *Cotton v. South Western Mutual Life Ass'n*, 115 Iowa, 729, 87 N. W. 675—the consolidated or reinsuring company issued its own new policies

of insurance, but without new applications by the members and without new medical examinations, while in the third case—*Parvin v. Mutual Reserve Life Insurance Company*, 100 N. W. 39 (Iowa)—no new policies were issued. In all cases there was a contract by the company sued to assume all liabilities of the former society, and to take over all the members of the latter company and some such general contract between the Fraternal Army of Loyal Americans and the defendant must, it would seem, have been made here.

The plaintiffs' declaration proceeds on the theory that they can recover under section 8 of the fraternal benefit association act, which provides as follows: "Such societies shall not employ paid agents in soliciting or procuring members, except in the organizing or building up of subordinate bodies, or granting members inducements to procure new members."

We are of the opinion that the only method contemplated by this section of securing new members was by individual application and medical examination, "the plan of organization" requiring such preliminary steps as much in the case of later applicants as it does in case of original organization. *Fraternal Tribunes v. Steele*, 114 Ill. App. 194.

Plaintiffs therefore cannot claim that this "consolidation" and the "transferring of 22,500 members caused by them" was such a securing of new members or building up of new subordinate lodges as section 8 refers to. If we are right in this conclusion, then this section contains an express prohibition against such a claim as the plaintiffs now make for compensation.

The courts of at least three states have already condemned wholesale transfers of membership similar to the case at bar.

In *State v. Bankers' Union*, 99 N. W. 531 (Neb., 1904), the court says: "It is charged that the defendant has diverted the funds of the society and paid out large sums for the alleged purchase of the business and membership of other purchased organizations, and that the memberships of such other purchased organizations were admitted to the defendant association without medical examination, at lower and

less rates of charges and assessments than required from persons originally becoming members of the defendant society. * * * "Referee finds * * * of these evils the following are the most conspicuous. * * * There are of necessity members whose health has failed or who have passed the age of 55, between the date of the entry into the transferred order and its transfer to another order. These must either be ignored and their insurance thus destroyed without their consent, or a physical examination must be waived contrary to the provisions of the statutes of the state. Reserves accumulated must be diverted by the transferred society to an improper purpose, and thus there must be violated a sacred trust." * * *

"The statute prescribes the qualifications of members that may be admitted, and to admit members above the age limit or without medical examination is clearly in violation of its provisions. What may not be done directly in that regard cannot be done by taking over the entire membership of another society, and the conduct of the defendant was clearly a manifest violation of law."

It does not affirmatively appear that in the case at bar any of the transferred members were over the age of 60 years—the limit prescribed in the act—but if such consolidations are to be allowed there would of necessity be some cases in which such facts would arise.

Certificates issued by the consolidated company to any members above the age of 60 years would be absolutely void. *Steele v. Fraternal Tribunes*, 215 Ill. 190 (affirming 114 Appellate, 194.) And any such certificate holder in the former society which had been consolidated and gone out of existence would be left without adequate protection.

Bankers' Union of the World v. Crawford, 73 Pac. 79 (Kansas, July, 1903). In this case it appears that a contract was made Oct. 12, 1901, by which the general officers of the National Aid society, a fraternal insurance company, should do all they could to secure the transfer of the management of that association to the Bankers' Union and to procure

members of the former to become members of the Bankers' Union, and said officers were to receive \$500 if the consolidation was completed, and the further sum of \$10,000 which was evidenced by notes; such consolidation was effected and the Bankers' Union obtained an increase of 4,000 members. Prior to this contract William H. Crawford died in good standing in the National Aid; the plaintiff was his beneficiary, but her claim had not been paid by the National Aid and she sued the defendant under the above contract by which defendant "assumed and agreed to pay all the just and legal claims" of the National Aid society. The court say at page 81: "It is not sufficient to authorize a corporation to act that no limitation is found in the law forbidding the act. The right to act must be conferred expressly or by necessary implication, or it does not exist. We have searched the statute in vain to find adequate warrant therein for a transaction such as is stated in plaintiff's petition. It is claimed that section 3575, Gen. St. 1901, relating to fraternal beneficiary societies, which authorizes such societies to make and enforce contracts in relation to their business, implies the right to make the contract in question. It is suggested that the increase of members is the chief object of the existence of these beneficiary associations; hence an agreement made to promote that end would be one in relation to the business of the corporation.

"While, of course, no corporation, much less one of this character, could exist without persons connected therewith, neither could one like this long exist without a constant accession to its membership; it surely is a misuse of terms to say that the obtaining of members is the business of the corporation. Members enable it to pursue its business, but the obtaining of members is not its business. Its business is defined in the statute to be the making of provision for the payment of benefits in case of death, sickness, or temporary disability; and this business must be carried on for the sole benefit of its members and their beneficiaries. For the purpose of carrying on this business, such associations are authorized by the

statute to create a fund 'from which the expenses of such association shall be defrayed, which shall be derived from assessments, premiums, or dues from its members, and interest accumulations thereon.' Thus it appears clearly that these associations are to be administered for the sole benefit of their members and their beneficiaries, by means of assessments and dues collected from such members, that is, that only members may be called upon to contribute, and only they or their beneficiaries may receive indemnity. These associations are not permitted to go out and engage generally in the business of furnishing indemnity. Their distinct characteristics and charter life would be destroyed in so doing. The agreement counted upon in the case at bar contemplates the payment of money to one not a member of the Bankers' union from moneys not received from the association of which plaintiff is a beneficiary. Such a transaction is wholly outside of the letter and spirit of the charter act, and in excess of any power conferred upon the association. The making and procuring of it is therefore *ultra vires*, and not to be enforced. * * * It is, however, claimed by the defendant in error that, while it would not be permitted the Bankers' union to collect money from an assessment upon its members for the purpose of paying the death loss of one who had never been a member, yet it is competent for it to pay this death loss out of the expense fund which the association is authorized to accumulate; that the obtaining of members of any association costs approximately \$10 apiece, and that by this arrangement a large number of members were added without expense, so that the payment of this claim, which is in fact a mortuary one, might be made out of the expense fund, in lieu of paying a canvasser or deputy for accomplishing the same result. We are not disposed to give this suggestion serious consideration. To permit that to be accomplished indirectly which could not be done directly is to encourage indirect and reprehensible means, rather than open and fair dealing. Besides this, we find no allegations in the petition on which to base this claim."

The case of *Twiss v. Guaranty Life Association*, 55 N. W. 8 (Iowa), is to the same effect.

I have read the cases cited by plaintiffs to sustain their contention, but do not find that they call for extended comment. The case of *Parvin v. Mutual Reserve Life Insurance Company*, 100 N. W. 39 (Iowa), deals with the transfer of all members of an Illinois assessment company organized under the act that went into effect July 1, 1893. The only question before the court was as to whether the power to transfer or consolidate expressly given by that statute had been followed. The court, in its opinion, gave expression to some general propositions which do not, as we understand it, correctly represent the law of Illinois.

A careful reading of the fraternal benefit society act in our state makes it sufficiently plain, we think, that no such "consolidation" was ever contemplated or authorized by the legislature. These are unique corporations organized for "the sole benefit of its members and their beneficiaries and not for profit." It is repeatedly declared that they must maintain a lodge system with ritualistic form of work and representative form of government. As above stated, no paid agents are to be employed except in certain specified cases. The members of any religious denomination may incorporate under the act, and members in such corporation shall be confined to the members of such religious denomination.

Commercial travelers are also allowed to incorporate under the provisions of this act, but members of such incorporations are limited to those actually engaged as travelers or those who employ them.

The contract between a member and his society consists in his application, examination by physician, constitution, by-laws, and certificate. *Fullenwider v. Royal League*, 180 Ill. 625.

Suppose that a Methodist denomination association was organized under the act and then a "consolidation" or "merger" such as in the case at bar was brought about with some

Baptist denomination society similarly organized, or suppose a commercial travelers' association was so "consolidated" or "merged" with an association having miscellaneous members. Would not the contract as above defined between the Methodist society and its members in the first instance, and the contract between the commercial travelers' association and its members in the second instance, have been wholly violated? But it will be said such facts do not arise here. That is true, but these provisions and the possibility that such facts might appear in other cases, if mergers were allowed, show that the legislature never intended that they should take place.

Finally it is alleged by plaintiff that the defendant has received the benefits of the plaintiff's labor, and it is urged that the defendant is estopped to set up the defense of *ultra vires*. This contention is met by the following decision:

In *Fritze v. Equitable B. & L. Society*, 186 Ill. 183, the court says at 199: "The doctrine, however, that a corporation cannot avail itself of the defense of *ultra vires* when a contract has been in good faith performed by the other party and the corporation has had the full benefit of its performance was never held to have any application where such contract is immoral or illegal or prohibited by statute, or where its enforcement would be against public policy." The contract there was prohibited by the statute, not expressly, but by implication from omission as in the case at bar, and its enforcement was held to be against public policy.

In *Steele v. Fraternal Tribunes*, 215 Ill. 190, Mr. Justice Wilkin said: "It is insisted, however, that even though the contract be regarded as *ultra vires*, yet defendant in error cannot avail itself of such defense, the contract having been performed in good faith by the other party, and the corporation had the full benefit of such performance. We cannot agree with this contention. A contract of a corporation which is *ultra vires* in the proper sense of that term—that is to say outside the object of its creation, as defined by the laws of its organization and therefore beyond the powers conferred upon it by the legislature, is not only voidable, but wholly void and

of no effect. The objection to the contract here is not merely that the corporation ought not to have made it, but that it could not lawfully make it. The contract could not be ratified by either party because it could not have been authorized by either. No performance by the parties could give the unlawful contract validity or become the foundation of any right of action upon it. * * *

"A party dealing with a corporation having limited and delegated powers is chargeable with notice of those powers, and cannot plead his ignorance of their existence."

This case represents the law of this state as we understand it. A violation of a charter provision cannot be waived and no estoppel can be invoked. Such acts as are found in the Steele case and in the case at bar are to be distinguished from mere violations of by-laws adopted by the society which can be waived. (*Wood v. Supreme Ruling of the Fraternal Mystic Circle*, 212 Ill. 532.)

Surely if a certificate holder who has in good faith paid all his assessments cannot recover when his acceptance by the society was beyond its charter powers the plaintiffs here cannot be allowed to claim that the principle of estoppel forbids the defendant from pleading *ultra vires*.

The general demurrer to the first and sixth additional counts is therefore sustained.

(Municipal Court of Chicago.)

Rose Chudnovski

vs.

**James H. Eckels, et al., Receivers of Chicago Union
Traction C**

(1907.)

1. MUNICIPAL COURT ACT—JURISDICTION OVER ACTIONS BROUGHT ON CONTRACT, FOR PERSONAL INJURIES. Under section 2 of the Municipal Court Act giving jurisdiction to the municipal court in "all actions on contracts, express or implied," *held*, there being

nothing in the Municipal Court Act to show that the legislature used these words in any other than their common legal accepted sense, that the municipal court has jurisdiction over actions brought on contract for personal injuries.

2. CONSTITUTIONAL LAW—CLASS LEGISLATION. The provision of the Municipal Court Act giving jurisdiction to the municipal court over actions on contracts express or implied, when construed as giving jurisdiction over actions for personal injuries based on contract relations, is constitutional, and is not class legislation.
3. ACTIONS FOR PERSONAL INJURIES—JURISDICTION OF MUNICIPAL COURT OF CHICAGO. Plaintiff brought an action of *assumpsit*, setting up in the declaration that the plaintiff became a passenger on one of the street cars of the defendant, and further setting up an implied contract to safely carry the plaintiff, and the breach of such contract on the part of the defendant by negligently managing another car on another line so that it collided with the car upon which the plaintiff was riding, whereby the plaintiff was injured. Upon general and special demurrers to the declaration, *held* that the municipal court of Chicago had jurisdiction.

Action of *assumpsit*. Municipal court of Chicago. Heard upon general and special demurrers to the declaration before Judge Dicker.

The facts are stated in the opinion of the court.

DICKER, J.:—

This is an action in *assumpsit*. The declaration sets up that the defendants were engaged in operating a street railroad in the city of Chicago.

That the plaintiff became a passenger on one of its cars, and further sets up an implied contract to safely carry the plaintiff, and breach of said contract on the part of the defendant by negligently managing another car on another line, so that it collided with the car upon which plaintiff was riding, and the plaintiff was thereby injured, alleging damages of \$10,000.

General and special demurrers were filed to the declaration, on the ground that this court has no jurisdiction of the subject matter, as set forth in the declaration.

Section 2 of the Municipal Court Act provides, in part, as follows:

“That said Municipal Court shall have jurisdiction within the city of Chicago in the following cases: 1. All actions on contracts, express or implied, when the amount claimed by the plaintiff exceeds one thousand dollars (\$1,000), and all actions for the recovery of personal property, or for the recovery of damages for the conversion of and injury to personal property, when the value of the property, or the amount of damages sought to be recovered as claimed by the plaintiff exceeds one thousand dollars (\$1,000), and which, for convenience, will be hereinafter referred to and designated as cases of the first class—.”

It has been repeatedly held in this state, and it is conceded by the defendants, that there is a contract between the passenger who pays his fare and a carrier, and that an action in assumpsit will lie for the breach of such contract, and that there is no question but that the declaration filed in this case states a cause of action in contract against a carrier, although it states it more fully than is required.

It is contended, however, that the words “contracts, express or implied,” as used in this statute, and other statutes of the state of Illinois, do not include, and were not intended by the legislature to include cases of this nature.

“In order to ascertain the legislative intention, the primary rule is that a statute is to receive that meaning which the ordinary reading of its language warrants, words not technical being taken in their ordinary familiar acceptation, with regard to their general and popular use; and the meaning thus arrived at must be adopted when it involves no absurdity, if from a view of the whole law and other laws in *pari materia*, no different legislative intent is apparent.

If the language is clear, and admits but one meaning, the legislature should be intended to mean what it has plainly expressed, and there is no room for construction.” 26 Am. & Eng. Ency. of Law, 598.

“The principle just stated includes implicitly the further

rule that it is the duty of the court neither to add anything to nor to take anything from a statute, unless good grounds appear for thinking, that the legislature intended something which it has failed precisely to express.

"Thus an exception out of the general provisions of the statute will never be implied in favor of particular persons or cases unless they are expressly mentioned; for general words in a statute must receive a general construction, unless there is something in it to restrain them." 26 Am. & Eng. Ency. of Law, 600, 601.

Our own supreme court says, in *C., M. & St. P. R. R. v. Dumser*, 109 Ill. 402, 410: "Where a statute is expressed in clear and precise terms, where the sense is manifest, and leads to nothing absurd, or where its provisions, if literally applied, would work no palpable injustice, nor contravene any imperative public exigency, there can be no reason not to adopt the sense it naturally presents. In such case there can be no necessity for restricting its operation, and the statute should be enforced as it is plainly written."

The jurisdiction conferred upon the municipal court in civil cases may be properly divided into three general classes. "First. All those classes of suits and proceedings, whether civil or quasi-criminal, of which justices of the peace are now given jurisdiction by law * * * when the amount sought to be recovered, whether by way of damages, penalty or otherwise, if the suit or proceeding be for the recovery of money only, or the value of the personal property claimed, if the suit or proceeding be brought for the recovery of personal property, does not exceed one thousand dollars. * * *

"All other suits at law, for the recovery of money only, when the amount claimed does not exceed one thousand dollars."

As to this class of cases, there are no written pleadings, except as expressly provided for in the statute, and an examination of the statute will show that it was expected or intended that the cases should have speedy hearing and be promptly disposed of, with as little technicality and formality as possible.

The second class of cases are those transferred from the circuit and superior courts of Cook county.

The third class are those provided for by the first paragraph of section 2 of the act above quoted.

An examination of the act shows that in the disposition of this latter class of cases common law pleadings and practice prevail. Therefore all suits brought under this section of the act must be brought under some of the forms of action known to common law, and in framing the section it will be presumed that the legislature had this in view.

At p. 97, vol. 1, of Chitty on Pleading, it is stated: "Personal actions are in form *ex contractu* or *ex delicto*, or, in other words, are for a breach of *contract*, or for *wrongs* unconnected with contract." Considering this section, therefore, in view of the subsequent provisions of the statute regarding the pleadings and practice in suits under this section, and in view of the well-known rules of common law in relation to pleading and practice, there appears to have been conferred on the municipal court jurisdiction in all cases for breach of contract, express or implied; or, in other words, actions *ex contractu* and certain actions *ex delicto*, namely, replevin, trover, and actions on the case for injury to personal property.

There is nothing in the statute itself to justify the assumption that the legislature intended any narrower interpretation of the words "contracts, express or implied," than is above set forth. Where the same words are used in the Practice Act, section 37, providing for affidavit of claim and affidavit of merits the words "contracts express or implied" are modified and limited by the words immediately following: "for the payment of money," and the same modification appears in section 38 of the Justice Act.

Subdivision 2 of section 2647, Revised Statutes of Wisconsin, provides: "The plaintiff may unite in the same complaint several causes of action, whether they be such as were formerly denominated legal or equitable, or both, when they arise out of * * * (2) contract, express or implied."

In the case of *Childs v. Harris Mfg. Co.*, 32 N. W. 43, 68

Wis. 231, the supreme court of Wisconsin held that the words "contract, express or implied" in that statute would include a judgment. In the case of *Umlauf v. Umlauf*, 103 Ill. 651, 654, our supreme court, in construing the act relating to appeals from the appellate to the supreme court, says:

"The term 'contract' in its popular signification, is generally limited to actual agreements between determinate contracting parties, but in law it has a much more extended signification. There are many duties and obligations growing out of certain relations which are regarded by the law as species of contracts, where it is clear there never was any actual agreement between the parties to such relations. Hence it is said by Mr. Bishop, in defining a contract, that—'a contract is a promise from one to another, either made in fact, or created by law, either to do, or refrain—etc.' " Bishop on Contracts, secs. 1, 5, 72.

There being nothing in the act, therefore, to show that the legislature in this section used the words "contracts, express or implied," in any other than their common, legal accepted sense, I am of the opinion that the municipal court acquired thereby jurisdiction in all cases *ex contractu*, and that the case at bar is within the purview of the act.

It is further contended by the defendant that, if the intention of the legislature be construed to be that actions may be brought on contract for personal injuries under class 1, then it is submitted that so much of the section as is comprised under the heading "Class 1" is unconstitutional and a denial of equal rights, privileges and immunities to each citizen. Article 4, section 2 of the constitution of the state is violated, because this would be class legislation, and the fourteenth amendment to the federal constitution is violated because there is denied the equal privilege and immunity to every citizen of the United States residing within the state of Illinois.

I do not consider this contention well taken, and it is not substantiated by any of the cases cited, all of which are based upon the view of the court that the acts passed upon were de-

signed to discriminate in favor of or against certain classes of persons.

Here the distinction between the cases that can be brought and those that cannot be brought is based on well-known principles of the common law. If it is not competent for the legislature, in fixing the jurisdiction of courts of limited jurisdiction, to make such classification according to well-known forms of actions and with reference to the remedies sought, then it could be as well claimed that the Justice Act is unconstitutional because certain classes of suits where less than \$200 is involved can be brought in such courts, while other claims, in which like amounts are involved, cannot be brought because the form of remedy required is different, and that the act conferring common law jurisdiction in the county court is class legislation because it does not include cases involving less than \$1,000 where an equitable remedy is sought.

There is no reason apparent why it is not as competent for the legislature, in the municipal court act, to have given jurisdiction in cases based on contracts and to withhold it in cases based on torts than it is to have conferred upon the court jurisdiction in cases of law and withheld it in cases in equity.

By the amendment to the constitution of 1904 the general assembly was authorized to create a municipal court in the city of Chicago, and to fix the jurisdiction and practice, and in pursuance to that amendment the present court was created and its jurisdiction fixed by general classification applicable alike to all classes of people residing and found within its jurisdiction, and this provision can in no sense be held to be class legislation.

The demurrer of the defendant will therefore be overruled.

NOTE.

The foregoing decision was affirmed by the supreme court of Illinois in February, 1908.—Ed.

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